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COMPANY LAW & PRECEDENTS-PART-I,

**COMPANY PROMOTION
AND
MANAGEMENT.**

Being a lucid, comprehensive and upto-date treatise on the formation
and constitution as also on the management and conduct of
Limited Companies in India with Indian Companies'
Rules as amended upto-date and Statutory
Forms.

BY

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& "Law of Court-fee and Suit Valuation", etc. etc.

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BY THE SAME AUTHOR.

" COMPANY MEETINGS "

A comprehensive handbook containing all about different kinds of General Meetings of the Companies, procedure thereat and conduct thereof including Notices, Resolutions—Ordinary, extra-ordinary and Special—Votes, proxies, Chairman, Speeches, Adjournments, Minutes and Rights of Members, etc., etc., with several useful appendices, containing relevant forms and precedents and other useful information

It is easily the most reliable and practical guide for Secretaries, Managers, Directors and Chairmen of Limited Companies and in fact for all those concerned with holding and conduct of General Meetings of a Company

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CHAPTER I

PRELIMINARY

History of Legislations on Company Law in India.—An Act for Registration of Joint Stock Companies was for the first time passed in India in the year, 1850. This was followed by the Act XIX of 1857 and VII of 1860 respectively. In 1866, a comprehensive Act (X of 1866) for consolidating and amending the Company Law was passed, which was, in turn, repealed by Act VI of 1882. The last mentioned Act was repeatedly amended till 1910 by various Amending Acts and at last, following the English Companies (Consolidation) Act, 1908, Act VII of 1913 was passed by the Indian Legislature. This Act of 1913, as amended by various Amending Acts, is still in force. The most comprehensive and far-reaching of these amendments were, however, those introduced by Act XXII of 1936, which came into force on 15th January, 1937. The extensive amendments made by the Amending Act of 1936, though mainly on the lines of the English Companies Act of 1929, have, in certain respects, gone far ahead of the English Law, in order to suit special conditions prevailing in India. The present Act has again been amended, though in minor details, by the several Amending Acts during the last decade.

Company—Definition of the term. According to Section 2(2) of the Act, it means a company formed and registered under the Indian Companies Act, 1913, or an existing company. "Existing Company" has been defined in Sec. 2(7) as a company formed and registered under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882. Thus the Indian Companies Act, 1913, recognises not only the Companies formed and registered under the present Act but also those formed and registered under the previous Acts.

Different kinds of Companies under the Act.—Different kinds of Companies contemplated by the Indian Companies Act, are:—(1) an unlimited company, i. e., a company not having any limit on the liability of its members; (2) a company limited by shares, i. e., a company having the liability of its members limited by its Memorandum to the amount, if any, unpaid on the shares respectively held by them. This is the most common form in which the companies are registered in these days; and (3) a company limited by guarantee, i. e., a company having the liability of its members limited by its Memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up.

PUBLIC AND PRIVATE COMPANIES.

Again, each of the three kinds of companies described above may either be private or public. A private company means a company which by its articles restricts

the right to transfer the shares, if any, and limits the number of its members to fifty (excluding, however, the persons in the employment of the company), and prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company. If two or more persons hold one or more shares in such a company jointly, they are treated as a single member for the maximum limit above mentioned. A public Company is any company, other than a private company, registered under the present Act of 1913, or under any one of the Acts of 1882 or 1866.

Main points of distinction between a private and public company :— A private company is under the Indian Companies Act exempt from many of the provisions of the Act otherwise applicable to a public company. The main points of distinction between the two kinds of the companies may be briefly stated as under :—

(i). In a private company the number of its members is limited to 50, exclusive, however, of persons in the employ of the company. There is no such restriction in the case of a public company, which can have any number of members.

(ii). In a private company, the right to transfer its shares if any, is restricted. Such a company must have in its articles restrictions on the right of transfer of shares, while no such restrictions would be found in the case of a public company.

(iii). A private company cannot issue any invitation to the public to subscribe for any of its shares or debentures, but there is no such restriction in the case of a public company.

(iv). Any two or more persons can, by subscribing their names to a Memorandum of Association and complying with the requirements of the Act in respect of registration, form a private company. In the case of a public company, however, there must be at least seven persons for the purpose.

(v). A private company is not required under the Law to issue any prospectus or a statement in lieu thereof, while a public company must issue such prospectus or statement in lieu thereof and file the same with the Registrar, Joint Stock Companies, before it can commence its business.

(vi). A private company, unlike a public company, is not required to hold a statutory meeting or to file statutory report with the Registrar.

(vii). A private company need not file its balance sheet while a public company must file one every year.

Other privileges and immunities enjoyed by a private company :—

Besides the advantages referred to in the last preceding para, a private company enjoys the undermentioned privileges and immunities not available to a public company :—

(1) It can, unlike a public company, give any financial assistance for the purchase of its own shares. Sub-section (2) of Section 54A not being applicable to it.

(2). Compulsory provisions as to meetings and votes as contained in Section 79(1) do not apply to a private company; and consequently such a company can convene a general meeting (other than a meeting for passing a special resolution or an extraordinary resolution) by giving less than 14 days' notice, if so authorised by its articles.

(3). Provisions of S. 83A and S. 83B do not apply to a private company, and accordingly a private company, unlike a public one, can have less than three directors. In fact, it can have only one director. Again a private company may have any number of permanent directors, i. e., directors whose period of office is not liable to determination at any time by retirement of directors by rotation, while a public company cannot have more than one-third of the whole number of directors as permanent directors not liable to rotation.

(4). Again, provisions of Section 84 relating to restrictions on the appointment or advertisement of directors in a public company do not apply to a private company, not even to a public company which was a private company before becoming a public company, and accordingly a private company can appoint directors by its articles without any restriction. Likewise, a private company has not to file with the Registrar a list of persons who have consented to be directors of the Company.

(5). The provisions of Section 86D do not apply to a private company and accordingly such a company, unlike a public one, may make any loan or guarantee any loan made to its directors or their firms or to other private companies of which such directors are members or directors.

(6). Likewise, the restriction on the powers of directors of a public company in the matter of dealing and selling or disposing of the undertaking of the company and remitting any debt due by a director as contained in Section 86H do not apply to a private company.

(7). Again, the provisions of S. 87A as to the duration of appointment etc., of Managing Agent in a public company, do not apply to a private company.

(8). Similarly, the provisions of S. 87C relating to the remuneration of Managing Agent of a public company restricting such remuneration to a sum based on a fixed percentage of the net annual profits of the company together with an office allowance to be defined in the Agreement of management, do not apply to a private company.

(9). S. 87I restricting the number of directors appointed by the Managing Agent of a public company to one-third of the whole number of directors in such company, does not apply to a private company.

(10). The provisions of S. 91B relating to the prohibition of voting by interested director and as to the exclusion of such director in being counted for the purpose of a quorum at the time of any such vote, do not apply to a private company.

(11). Likewise, the provisions of S. 91D requiring copies of the memorandum of contracts made on behalf of a public company in which said company is an undisclosed principal to be sent to its directors, do not apply to a private company.

(12.) Again the restrictions as to allotment as contained in Section 101 do not apply to a private company.

(13.) Likewise, restrictions on the commencement of business or the exercise of the borrowing powers applicable to a public company and contained in Section 104, do not apply to a private company.

(14.) Again the provisions of Section 144 do not apply to a private company and accordingly an Auditor of a private company need not hold a certificate from the Central Government entitling him to act as such Auditor.

(15.) Regulations 78 to 82 of the Table "A", do not apply to a private company and accordingly the provisions relating to the rotation of directors, as contained in the said Regulations are not compulsory for such a company.

Certain special obligations imposed on private companies by the Act:—A private company, while sending its annual list of members and summary to the Registrar as contemplated by Sec. 32, must send with the said return a certificate signed by a Director or other officer of the company that the company has not, since the date of the last return or, in case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the Company, and where the annual return disclosed the fact that the number of members of the Company exceeds fifty also a certificate so signed that the excess consists wholly of persons in the employ of the company who are not to be included in reckoning the number of fifty under Sec. 2(1) (13) (b) of the Act.

Again, a private company is prohibited from issuing share-warrants to bearer, as sub-section (1) of Sec. 43 does not apply to such company. The reason of this restriction is that the issue of such bearer share-warrants is incompatible with the position of a private company, which by its very nature shall have only a limited number of members and must observe restrictions enumerated in Sec. 43 (2).

Conversion of private company into public company:—A private company may at any time be converted into a public company by complying with the provisions of Sec. 154 (1), which, provides that if a private company alters its articles in such manner that they no longer include the provisions which under Sec. 2 (1) (13) are required to be included in the Articles of a private company, the latter company shall, as on the date of the alteration of its articles in the manner aforesaid, cease to be a private company, and shall, within a period of fourteen days after the said date, file with the Registrar a prospectus or a statement in lieu of prospectus in the form and containing particulars set out in the form marked II in the second schedule.

Conversion of public company into private company:—There is no corresponding provision in the Act for converting a public company into a private company. But the mere absence of such an express provision does not debar a public company being converted into a private one and it certainly can be converted into a private company, by altering its articles so as to limit the number of its members to fifty, prohibit any invitation to the public to subscribe for its shares,

debenture or debenture stock and impose restrictions on the transfer of its shares as contemplated by Sec. 2 (1) (13) of the Act. It has been so held in a recent Patna Case. The following observations of Harries, C. J., in the course of his judgment in the last mentioned case are worthy of note :

"In my view, however, the learned judge was wrong in holding that a public company could not be converted into a private company except by winding up and reconstitution. It is, in my judgment, now well established that such a conversion can take place if suitable amendments are made to the Articles of Association and it is to be observed that amendments to the Articles of Association do not require the confirmation of this Court. The Registrar of Joint Stock Companies appears to think that S. 154, Companies Act, prevents the conversion of a public company into a private company by mere alterations in the Articles of Association, but in my judgment, that view is not well-founded. S. 154 deals with the conversion of a private company into a public company, and the section is based upon the assumption that such a conversion can be made by merely altering the Articles. The purpose of the section is to ensure that when a company has been converted from a private company to a public company certain information must be sent to the Registrar of Joint Stock Companies, and if such is not done certain penalties are provided. There is nothing in Sec. 154 from which we can infer that a public company cannot be converted into a private company by alteration of the Articles. There was no need for a specific section to deal with such a conversion, because the information which S. 154 requires to be sent to the Registrar need not be sent where the conversion is from a public company into a private one. In short, where such a conversion takes place, there is no need for a section corresponding to S. 154. It seems clear that for many years in England the view has been held that a public company may be converted into a private company by suitable alteration in the Articles and that view is already expressed by the learned Editor of the recent edition of *Halsbury Laws of England*: See Vol. 5, P. 133. In no case has the Registrar of Joint Stock Companies in England declined to recognise such a change, and it may now safely be inferred that a conversion such as the one proposed can be made merely by altering the articles provided that suitable alterations are made."

SUBSIDIARY COMPANIES.

This is yet another variety of companies created by the Amending Act of 1936. It is defined in Section 2 (2) of the Indian companies Act. Where the assets of a company consist in whole or in part of shares in another company whether held directly or through a nominee and the amount of the shares so held is at the time when the accounts of the holding company are made up more than fifty per cent of the issued share capital of other company, or the company has power directly or indirectly to appoint the majority of the directors of that other company, the latter company is deemed to be a subsidiary company. S. 2 (2) referred to above is quoted below for facility of reference. It runs as under :—

"2(2)—Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of this Act or not, and

COMPANY PROMOTION

- (a) The amount of shares so held is at the time when the accounts of the holding company are made up more than fifty per cent of the issued share-capital of that other company or such as to entitle the company to more than fifty per cent of the voting power in that company, or
- (b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed or by virtue of shares issued to it for the purpose in pursuance of those provisions) directly or indirectly to appoint the majority of the directors of that other company.

That other company shall be deemed to be a subsidiary company within the meaning of this Act, and the expression 'subsidiary company' in the Act means a company in the case of which the conditions of this sub-section are satisfied and includes a subsidiary company of such company.

Provided that where a company the ordinary business of which includes the lending of money holds shares in another company as security only, no account shall, for the purpose of determining under this section whether that other company is a subsidiary company, be taken of the shares so held."

Such a company, even though it may be a private one, does not enjoy most of the privileges and exemption to which a private company is otherwise entitled to. Thus a subsidiary private company is not exempted from the provisions of Secs. 79 (1), 83 A, 86D, 86H, 87A, 87 C, 87D, 91B, 91D and S. 144. Again such a company must adopt regulations 78 to 82 of Table A in its articles, like a public company.

Special provisions relating to holding companies :—The following special provisions relating to the subsidiary and the holding companies are worthy of note :—

- (i) By the provisions of S. 54-A a subsidiary company cannot buy the shares of the holding company of which it is the subsidiary unless the consequent reduction of capital is effected and sanctioned in the manner provided by Secs. 55 to 66.
- (ii) By virtue of S. 132 A of the Act, the balance sheet of every holding company must include the particulars as to the subsidiary companies as stated in that section, which is reproduced below :

S. 132 A. (1) Where a company, in the Act referred to as the holding company, holds shares, either directly or through a nominee, in a subsidiary company or in two or more subsidiary companies there shall be annexed to the balance sheet of the holding company the last audited balance-sheet, profit and loss account and auditor's report of the subsidiary company or companies, and a statement signed by the persons by whom, in pursuance of Sec 133, the balance-sheet of the holding company is signed stating how the profits and losses of the subsidiary company, or, where there are two or more subsidiary companies, the aggregate profits and losses of those companies, have been dealt with in or for the purposes of the accounts of the holding company, and in particular how and to what extent—

- (a) provision has been made for the losses of a subsidiary company either in the accounts of that company or of the holding company or of both, and
- (b) losses of a subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the company as disclosed in its accounts :—

SUBSIDIARY COMPANIES

Provided that it shall not be necessary to specify in any such statement the actual amount of any part of any such profits or losses which has been dealt with in any particular manner ;

Provided further that for the purposes of this section an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not be deemed to be a holding company by reason only that part of its assets consists in 51 per cent or more of the shares of another company.

(2) If, in the case of a subsidiary company, the auditor's report on the balance-sheet of the company does not state without qualification that the auditors have obtained all the information and explanations they have required and that the balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company, the statement, which is to be annexed as aforesaid to the balance-sheet of the holding company, shall contain particulars of the manner in which the report is qualified.

(3) For the purposes of this section the profits or losses of a subsidiary company mean the profits and losses shown in any accounts of the subsidiary company made up to a date within the period to which the accounts of the holding company relate, or if there are no such accounts of the company available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary company which became available within that period.

(4) If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid, the directors who sign the balance-sheet shall so report in writing and their report shall be annexed to the balance-sheet in lieu of the statement.

(5) The holding company, may by a resolution, authorise representatives named in the resolution to inspect the books of account kept in accordance with section 130 by any subsidiary company, and on such resolution being passed those books of account shall be open to inspection by those representatives at any time during business hours.

(6) The rights conferred by section 138 upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of that subsidiary company.

Construction of the Act :—The primary canon of construction is that the court must take the legislature to mean what it has plainly expressed and where the meaning of a statute is plain and clear they have nothing to do with its policy its justice or injustice.

The true mode of construction is to take the words as the legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by preambles or by the contexts of the words in question controlled or altered². The following observations of Lord Brougham in the last mentioned case made as early as 1846 still hold good and are quoted below :—

2. *Crawford v. Spooner* (1846) 4 M. I. A. 179 (187).

"We cannot fish out what possibly may have been the intention of the Legislature. We cannot aid the Legislature's defective phrasing of the statute, we add, and mend, and, by construction, make up deficiencies which are there. If the Legislature did intend that which it has not expressed much more, if the Legislature intended something very different, if the Legislature intended something pretty nearly the opposite of what is said, not for judges to invent something which they do not meet within the words of the text (aiding their construction of the text always, of course, in the context), it is not for them so to supply a meaning, for, in reality, it is to be supplying it. The true way in these cases is to take the words which the Legislature have given them and to take the meaning which the words naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or qualified, and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another act supply that meaning and supply the defect in the previous Act."

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The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. The following observations of Lord Simon, L. C., in the last mentioned English case (at page 1022) are worthy of note :—

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"We must not shrink from an interpretation which will reverse the plain meaning of the law, for the purpose of a large part of our statute law is to make law which would not be lawful without the statute, or, conversely, to produce results which would otherwise follow. Judges are not called upon to give their opinion of sound policy so as to modify the plain meaning of the words, but where, in construing general words, the meaning of which is entirely plain, there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disavow fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the statute, we should avoid a construction which would reduce the legislative intention to futility and should rather accept the bolder construction based on the words, which that Parliament would legislate only for the purpose of bringing about an effective result."

Again the preambles do not control the enactments where such enactments are expressed in clear and unambiguous terms, though they afford a clue to the scope of the statute, when the words construed by themselves without the aid of preambles are capable of more than one meaning (*Ibid*). Headlines prefixed to sections are also regarded as preambles. The marginal notes are not parts of the Act and cannot be referred to in construing the Act. Similarly proceedings of the Legislature cannot be referred to for its purpose. Nor can the Report of the Select Committee be so referred.

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Value of English and American decisions in construing Indian Companies Act. Where a certain section in the Indian Companies Act is taken bodily from the English statute, English authorities on the subject would be a safe guide to the interpretation and other analogous sections.

3. *Nokes v Doncaster Amalgamated Collieries* (1940) A. C. 1014.

4. *Rowell v. Kempton Park Race Course Co Ltd* 1899 A. C. 148 (185).

5. *Per Ram Lal, J, in Nasir Ahmad v. Official Liquidator Peoples Bank of Northern India Ltd* 18 Com. Cas.1 (10-11).

Indian Courts in such cases are in practice, if not in theory bound by the decision of the English Courts. (193) 13 M. L. T. 282).

Accordingly it was held on the interpretation of Section 171 of the Indian Companies Act, that the section being admittedly borrowed from the English Statute Law on the same subject, it was intended to have the same effect as the corresponding section in England and the wording of Section 171 aforesaid could not have been intended to have a different meaning in India from that which had previously been placed upon its meaning by the English authorities on the point.⁵ Buckett, J. in the last mentioned [case at page 6 observed as follows :—

“There are many cases in which the technical meaning attached to legal terms in England should not be introduced into the construction of the wording of the Indian Statutes, but where there is no question of introducing any unnecessary complication from English Law, and it is, on the contrary, question of avoiding unnecessary hardship which will ensue in attaching an entirely new meaning to words which had not hitherto had placed upon them an interpretation involving any such consequence by the English authorities, it would seem impossible to suppose that the Indian Legislature could have intended to import a new meaning directly opposed to what has been held in England to be the real intention of such words”.

Where there is not direct authority in the English decisions on the point, but there are direct authorities in the decisions of the United States, the American authorities are no doubt entitled to highest respect, but the decision of the question must be made by English Law. (Per Lord Macnaghten in 12 C. W. N. 1053 (1059).

Rule of Supremacy of Majority

Cardinal Rule of Corporation Law :—It is a cardinal rule of Corporation Law that *prime facie* majority of its members is entitled to exercise the powers of the Corporation. 4, 5, 6. Accordingly whenever a certain number are incorporated a major part may do (subject, however, to the modification of the above rule of the supremacy of the majority in certain cases to be discussed hereafter) any corporate act, and where all are summoned and a part appear, a major part of those that appear may do such corporate act. 7 So where a general meeting of shareholders of a company is convened after notice to all the shareholders, but some of them do not choose to appear they are bound by the resolutions passed thereat by the majority of the shareholders present at such meeting. 8

4. Mayor etc. of Merchants of Staple of England Vs. Governor of Company of Bank of England (1887) 21 Q. B. D. 16.

5. Lyster's Case, (1867) 4 Eq. Cas. 238.

6. Regents Canal Iron Co. (1867) W. N. 79.

7. Per Lord Hardwich in Attorney General vs. Davy, 2 Atk. 212.

8. Nabin Kishori vs. Jagneshwar, A. I. R. 1933 Cal 809 (810).

Extension of the applicability of above rule :—The same rule would equally apply where a corporate power has been delegated to a smaller body.⁹ Accordingly where the Articles of Association of a Company gave the board of its directors power to regulate its own business and to fix a quorum and the board passed at a meeting, where five out of the six directors were present, a resolution sanctioning the power of attorney to the general manager, without fixing a quorum before hand, it was held that the resolution authorising the power of attorney was valid.^{10, 11} A contrary view was, however taken in an English case wherein this rule, namely, that when a duty is delegated to a body of persons those persons can act at a meeting by majority was held to be inapplicable to a case of Articles of Association of a company. In this case, an article of association of the company empowered its governing directors to appoint any additional director. Two out of the three governing directors of the company purported to appoint by a resolution an additional director against the will of the third. It was held, under the above circumstances, that the powers conferred by the aforesaid article on the governing directors for the purpose was to be exercised by all of them, and that the resolution was, therefore, invalid. The last mentioned case has not been followed in a recent case of Lahore High Court mentioned above which has preferred to follow the other cases cited above. The following extract from the Judgment of Blacker, J., in the last mentioned Lahore case may be read with advantage in this connection :—

“ The rule, according to Palmer, is equally applicable to a company under the Act, save so far as its constitution or articles, or the Act itself, exclude or modify it. The same rule applies where a corporate power is delegated to a smaller body. The first authority cited before us on behalf of the appellant was (1867) 4 Eq. 233. That was a case of a limited liability company, whose articles laid down no quorum. It was found that though there were six directors the largest number that attended was four and that the usual number was two. The number that attended the material meeting was two, and the Master of the Rolls (Lord Romilly) held that that was a sufficient quorum. He repelled the suggestion that, in the absence of any stipulation to that effect, it requires the total number to be present. In (1888) 21 Q. B. D. 160, the rule referred to in Palmer was reaffirmed. The case, however, was not of a limited liability of company, but of an ancient corporation whose acts were regulated by its charter and by the general corporation law. In (1867) W. N. 79, the board had power to fix a quorum but, as in this case, had not done so. The total number of directors was nine. There was an understanding that no business would be done unless three were present. It was held that the acts of three were valid. The Vice-Chancellor, moreover, went on to remark that even if there had been no such understanding the clauses in the association deed providing for the legality of acts done by the board of directors would have been satisfied by only two directors being present to form the board. In (1882) 46 L. T. 296 the remarks of the Lord Chief Justice (Lord Coleridge) and of Brett, L.J. appear fully to support the propositions laid down in Palmer. On the other hand, there appears to us only one case which might be taken as supporting the contrary view. That is (1934) Ch. D. 171. In that case there is a dictum of Bennett J., which has been cited by the respondent, to the effect

9. York Tramways Co. Ltd. vs. Willard, (1882) 82 B. D. 685 (689).

10. Ganesh Flour Mills Co. Ltd. vs. Jag Mohan Saran, A. I. R. 1942 Lah. 68.

11. Perrott Ltd. vs. Stephenson, (1934) Ch. D. 171; 108 L. JCh. 47.

that the rule relied upon by the appellant in the present case had no application to companies incorporated under the Companies Act, but is applicable to cases where a corporation is entrusted with a duty of public nature. The proposition, however, if I may say so with all respect, seems to have been rather broadly laid down by his Lordship in view of the authorities to which I have already referred. The judgment itself shows that the decision was based rather on the consideration that in that particular case a construction of the articles themselves led to an interpretation of the contrary to the general rule. There are some remarks in (1890) 59 L. J. Ch. 616 at p. 624 which have been cited on behalf of the respondent, but they refer to the particular case of a sub-committee to which a board has delegated specified functions. A consideration of the above authorities leads me to the conclusion that the rule is as stated in *Palmer* and that unless a construction of the articles leads to the conclusion that there was an intention to supersede the ordinary rule, it must be held that, where no quorum has, in fact, been fixed the acts of the major part of the directors for the time being are valid...".

The implications and modifications of and exception to the above general rule of the 'Supremacy of Majority' shall be discussed in detail hereafter, while dealing with General Meetings of the Company.

THE POSITION OF OUTSIDERS DEALING WITH A COMPANY.

Doctrine of constructive notice :—It is well settled that any one, whether a shareholder or outsider, who has dealings with a registered company must be taken to have notice of the Memorandum and Articles of other regulations which form the constitution of the company (*Palmer's Company Law* 16th Edition at page 35). The reason of the above rule has been thus explained by Lord Hartherly in ¹² at page 893:—

"Every Joint Stock Company has its Memorandum and Articles of Association. Those Articles of Association are open to all who are minded to have any dealings whatsoever with the company and those who deal with them must be affected with notice of all that is contained in those two documents."

Rigor of the above rule relaxed by rule of "indoor of management" :—The rigor of this doctrine of constructive notice has, however, been relaxed to a considerable extent by the rule enunciated in ¹³, ¹², and other subsequent cases ¹⁴, ¹⁵, ¹⁶; according to which though a person dealing with a company is deemed to have had knowledge of the Memorandum and Articles of Association of the company, as he is bound to read those documents, he need not enquire into the regularity of the internal proceedings or the 'indoor management'. Thus where the Articles of a company provided as to how and under what circumstances the seal of the company was to be used by the Directors,

12. *Mahony vs. East Holyford Mining Co.* (1875) L. R. 7 H. L. 869 at page 893.

13. *Royal British Bank vs. Furguand*, (1856) 6 E. & B. 327.

14. *Euck vs. Tower Galvanising Co.*, (1901) 2 Q. B. 314.

15. *Montreal & St. Lawrence Co. vs. Robert*, (1906) A. C. 106 (P. C.).

16. *Dey vs. Pullinger Engineering Co.*, (1921) 1 K. B. 77 & 17 Bom. L. R. 1218.

it was held that though a person taking a document under Seal from the Directors of the company would be deemed to have had notice of the limitations under the Articles, he was not bound to see if the preliminaries necessary to be gone into have been observed, as he was entitled to assume that the directors were acting regularly.¹⁷ Similarly, where a person obtained from a company mortgage under Seal signed by two directors and the Secretary, but the mortgage deed had been sealed at an irregular meeting, when there was no proper quorum, it was held that the mortgage was, nevertheless, valid, as the mortgagee had no means of knowing of this internal irregularity in the management.¹⁸ So also, where by Articles of Association of a company the directors had powers to delegate to one or more of their body such of the powers conferred on the directors as they might consider requisite for carrying on the business of the company and to determine who should be entitled to sign contracts and documents on behalf of the company and a document purporting to be a guarantee was given to the plaintiffs executed by the Company in the following form :—"The F.E.B. Ltd. Signed by N. P." the last mentioned person being a director of the company, it was held that the plaintiffs were entitled to presume that the directors of the company had authorised N. P. to sign contracts on behalf of the company and that therefore the company was liable on the guarantee.¹⁹ In another case it was held that in the absence of anything in the Memorandum or Articles of Association of a company restricting its power to borrow through agents, borrowing by agent, appointed by various powers of attorney to borrow money on the security of the company's goods, was within their ostensible authority, the precise limit of agents' power to borrow being a matter of internal management into which a lender would not be required to enquire. The Company was held bound even by excessive borrowing by the appointed agents so long as those borrowings were within their ostensible authority.²⁰ In an Allahabad case,²¹ the above view has been adopted, and it has been held that a company is bound by its dealing with strangers who act *bona fide* with the company, for a company is liable for all acts done by its directors, even though unauthorized by it provided such acts are within the apparent authority of the directors and are not *ultra vires* the company, and consequently persons dealing *bona fide* with the managing director are entitled to assume that he has all such powers as he purports to exercise, if they are, powers which according to the constitution of the company, a managing director can have. Kanhai Lal J., during the course of his judgment, in that case observed as under :—

17. *Fountain vs. Carmarthen Railway Co.*, 5 Eq. 316.

18. *County of Gloucester Bank vs. Rudry Merthyr Steam and Colliery Co.* (1895) 1 Ch. 629.

19. *British Thomson Houston Co. Ltd. vs. Federated European Bank*, (1932) 2 K. B. 176 ; L. J. K. B. 690.

20. *Mercantile Bank of India vs. Chartered Bank of India, Australia and China*, (1937) E. R. 231.

21. *Baran Singh vs. Mufassil Bank Ltd.*, (88 I. C. 142).

“All persons dealing with a company must ascertain the limitations imposed by the articles of association, but they are not bound to draw any direct or obvious inferences from the provisions they find there, nor is there any obligation cast upon them to see that such directors are properly appointed or they have acted exactly in accordance with the manner prescribed therein (Grant's Law of Banking, 6th edition, page 607). The Articles of Association of the company define the power of directors as between themselves and the company, and unless there is anything in those articles limiting the powers of the Board of Directors in carrying on the ordinary business of corporation, a third party who deals with the directors or with the managers acting under those powers, however, irregularly, is protected if he acts in good faith in his dealings with them”.

Exceptions to the above rule of 'indoor management':—The rule above stated does not, however, apply to cases where a person purports to do something on behalf of a company, which is not within the ordinary ambit of his power, that is to say, when the act done in the name of the company is void *ab initio*, or where the document is a forgery ²² the reason being that the doctrine of 'indoor management' only applies to irregularities that otherwise might affect a genuine transaction. Accordingly, where the defendant bank negligently and in breach of the instructions given by their customers, the plaintiff company, paid cheque on the company's account signed by one director only, it was held that the Bank being put on enquiry and being negligent was not entitled to assume that a signature purporting to be of a new director was that of a person duly appointed. ²³ Again, the person claiming the benefit of the above doctrine must be a person who has no notice of the irregularity, for if he has notice of the irregularity he cannot claim the benefit of the above rule. ²⁴ Consequently persons in charge of the affairs of the company cannot claim the benefit aforesaid. ²⁵

ESTOPPEL BY A COMPANY

Company not bound by estoppel in matters ultra vires the company:—
A party cannot by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is under a legal disability from creating. Thus a corporate body cannot be estopped from denying that they have

22. *Rube vs. Great Fingall Consolidated*, (1906) A. C. 439.

23. *Liggist (B) Liverpool Ltd. vs. Baralay Bank Ltd.* (1928) 1 K. B. 48.

24. *Tyne Mutual Steamship Insurance Association vs. Peter Brown*, (1896) 74 L. T. 292.

25. *Howard vs. Patent Ivory Manufacturing Co.*, (1888) 38 Ch. D. 156.

entered into a contract which it was *ultra vires* for them to make,²⁶ No corporate body can be bound estoppel to do something beyond its powers. Similarly where a company pays dividend to a transferee under a forged transfer, it is not estopped from denying the transferee's title.²⁷

Company bound by estoppel in matters *intra vires* :—But in matters *intra vires* the company, it may be bound by the rule of estoppel. So where a company issued a certificate under its common seal stating untrue that A was the holder of certain paid up shares and B acted thereon, it was held that as against B, the company was estopped from saying that the shares were not paid up^{28, 29, 30 31}. There would, however, be no estoppel if the officer issuing the certificate had no authority to do so.^{32, 33} Again to render valid an act of directors of a company, which is *ultra vires* the directors being in excess of their authority, the acquiescence of the shareholders must be the same as the consent which would have given validity from the first, viz., the acquiescence of each and every member of the company. Of course this acquiescence cannot be presumed unless knowledge of the transaction is brought home to every one of the remaining shareholders. By knowledge of the transaction for there can be no ratification without an intention to ratify and there can be no intention to ratify an illegal act without knowledge of the illegality.³⁴

26.- Halsbury Laws of England, Vol. 13 at page 474 & (1943) Com. Cas. 61.

27. Foster *vs.* Tyre Pantoons and Ddry Ducks Co. (1893) 9 T. L. R. 450.

28. Burkinshaw *vs.* Nicolls, 3 App. Cas- 1004.

29. And also Burrows case ; 14 Ch. D. 432

30. Dixon *vs.* Kennaway and Co, (1906) 1 Ch. 838.

31. T. Balkis Consolidated Co. *vs.* Tomkinson. (1898) A. C. 306

32. Ruben *vs.* Great Fingall Consolidated ; (1906) A. C. 489.

33. South London Grey Hound Race Courses Ltd. *vs.* Waka. (1931) 1 Ch. 496

34. Premila Devi *vs.* Peoples Bank of Northern India Ltd. (1939) 9 Com. Cas. 1 (P.C.).

CHAPTER II

ILLEGAL ASSOCIATIONS

Prohibition of unregistered partnership, association or company exceeding certain number :—S. 4 of the Indian Companies Act forbids the formation of a company association or partnership consisting of more than ten persons for the purpose of carrying on the business of banking, unless it is registered as a company under the Act or unless it is formed in pursuance of an Act of Parliament or some other Indian Law or of a Royal Charter or Letters Patent. It likewise prohibits such a formation of more than 20 persons for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership or by the individual members thereof unless it is registered in the manner stated above. The above restriction is not, however, applicable to a joint family carrying on joint family trade or business. Where two or more such joint families form a partnership minor members of such families shall be excluded in computing the number of persons for the maximum limit mentioned above.¹

Applicability and objects of S. 4 :—To constitute an association within the meaning of S. 4, the existence of the legal relation between more than 20 persons giving rise to joint rights or obligations and mutual rights and duties is absolutely necessary.² But where the object is to form a company there is no need to show the existence of a legal relation between the persons forming the company. In such a case, as soon as the money is collected for the shares, the bargain is clinched so as to attract the provision of S. 4 (2) of the Act.³ For a company, association or partnership, carrying on business other than banking, to come within the mischief of S. 4, it is necessary that (i) it must have been formed for carrying on business; (ii) that the business must have for its end the acquisition of gain.⁴ Thus where eighteen companies or firms carrying on dealings in cotton comprising of more than 20 persons entered into a coalition with the object of working the ginning factories of its members for the benefit of all, agreeing that the net profits should be thrown into a pool to be distributed rateably among them, it was held that the association was essentially within the purview of S. 4.⁵ Similarly, association of more than 20 persons who joined themselves together in the purchase of property as owners and used it to make a gain thereby was held to be illegal.⁶ But unregistered land company of more than 20 members formed merely for acquiring and dividing land between the members, after making roads thereon, and not

1. *Neelamga Sastri vs. Appiah Sastri*, (1906) 29 M.d. 477 at 483 (F. B.)

2. *Dawson vs. King*, (1939) 9 Com. Cas. 224 (Rang).

3. 17 Cal, 786.

4. 10 N.L.R. 98=26 I. C. 618

5. 40 G. W. N. 476.

for carrying any business in land, were held not to come within this section.⁶ See also ⁷. Similarly, an association of persons contributing funds for helping sick member and dividing the balance left at the end of the year was held not to fall within the section.⁸

Object of S. 4:—The object of the provision contained in S. 4 was to prevent the mischief arising from large trading undertaking being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting and so might be put to great expenses, which was a public mischief to be repressed⁹. Thus the section requires registration only of commercial undertakings as distinguished from literary, scientific and charitable associations¹⁰. Thus a family pension fund formed with the object of providing for the maintenance of the widows, children and other relatives of the subscribers thereto who were more than 20 in number was held not to come within the mischief of the section, as it had not for its object the acquisition of gain, though the gain might have accrued incidentally, the *ratio decidendi* being that where the substantial purpose of an association is not to carry on business for gain, the fact that the gain may accrue incidentally or may arise from merely subsidiary provisions does not make registration necessary¹¹. In another case¹², it was held that an investment trust was not an illegal association although there were more than 20 members entitled to the benefit of it, inasmuch as the business of the trust was carried on by trustees who were less than twenty. The Bombay High Court has also held in a recent case that in order to come within the purview of this section, the association must be formed with a view to carry on business, but if it is not so formed, the mere fact that as the result of combination or agreement between the members there is a gain either to the association or its members, it would not require registration, even though it consists of more than 20 members.¹³ On the other hand, if one of the several objects of an association be the acquisition of gain, the mere fact that its members either singly or jointly, propose to dispose of the gain to some charitable object would not take it from the purview of S. 4¹⁴. Again an unregistered society consisting of more than 20 members and otherwise registrable would not be rendered legal simply because in its inception it comprised less than 20 members¹⁵. It would also follow from the above that an association initially illegal because of its members being more than 20 would not cease to be so merely by the reduction of its members. The defect of its non-registration can, however, be cured by its subsequent registration¹⁶.

6. *Sigfield vs. Roltor*, (1881) 45 L. T. 612.

7. *Crowther vs. Therley*. (1884) 50 L. T. 43=32 W. R. 330.

8. *One and All sickness and Accidental Assurance Association in re*: (1909) 25 T.L.R. 674.

9. Per James, L. J., in *Smith vs. Anderson*. (1880) 15 Ch. D. 247 (278)

10. *Arthur Avenue Association Hargrove and Co.*, 10 h A 542 (546)

11. 17 Cal 786 (808)

12. *Smith vs. Anderson*, (1880) 15 Ch. 247 (259)

13. 38 Bom. L. R. 408

14. 52 All. 325.

15. *In re: Thomas* (1882) 14 Q. B. D. 379.

16. *Thomas Ex parte Roppluton*.

Effect of non-registration :—An association requiring registration in view of S. 4 but not registered has no legal existence. It cannot enter into any contract. ¹⁷ Consequently if it has lent money on a promote, it cannot sue thereon ¹⁸, for an action by an illegal association must fail if the illegality of the association is disclosed. It cannot contract any debt ¹⁹. Nor can it be sued by a member or an outsider ²⁰. It cannot be wound up under the Companies Act at the instance either of a creditor or a shareholder ²¹. It cannot rank as a creditor in insolvency proceedings against an individual nor can prove its debts in liquidation proceedings ²⁰. But moneys advanced for the formation of such an illegal association may be recovered before it is actually applied for the illegal objects ²². Similarly an action for accounts against the treasurer and secretary of such an association of the subscription received by them from its members and the application thereof and payment of amount found due and other reliefs, was held to lie and it was held that the court was not debarred from affording relief to the members of an illegal association asking for the return of money paid into the hands of the agents for application for illegal purposes by granting an account ²³.

17. *Gunnings v. Hammond* (1882) 9 Q. B. D. 225.

18. *Show v. Benson* 11 Q. B. D. 563.

19. *London Marine Insurance Co* (1869) 8 Eq. 176.

20. *In re : Day Inre : Day* (1876) 1 Ch. D. C99.

21. *Padstow Total Loss Association* (1882) 20 Ch. D. 187.

22. *Strachan v. Universal Stock Exchange Ltd.* (1895) 2 Q. B. 697 & 7 Bang. 540.

23. *Greenberg v. Co-opersteen* (1926) 1 Ch. 657.

CHAPTER III

FORMATION OF COMPANY.

Company—how formed.—If the company to be formed is a public company seven or more persons may, by subscribing their names to a memorandum of association and otherwise complying with the requirements as to registration etc., form such a company, provided their association as such is for a lawful purpose. In a case of a private company, two or more persons, however, may form such company by subscribing their names instead of seven or more.

Promoters.—Thus before a company can be brought into being some person or persons must take an active part, more particularly in the early stages of its formation, e.g., preparation of memorandum and articles of its association, pre-incorporation agreements and registration etc. Such persons are promoters of the company.

Steps to be taken for formation of Company.—The preparation of the Memorandum of Association of the Company is the first step. Such a Memorandum is to be divided into paragraphs numbered consequently and must be printed.

The next step is the preparation of Articles of Association containing the regulations of the company for the management of its affairs and business. Such articles must also be divided into paragraphs numbered consecutively and printed. In case of a company (whether a public or private) limited by shares, Articles of Association signed by the subscribers to the Memorandum of Association may be registered, and for this purpose, the subscribers may adopt all or any of the regulations in Table A, except that certain regulations in Table A detailed in S. 17 (2) must necessarily be included in the Articles of Association of the company proposed to be floated. If no articles are registered, provisions contained in Table A will apply, but if such articles are registered the Table A will be excluded to that extent, provided however that the Articles of Association of every company shall always be deemed to include such of the regulations of Table A as are specifically mentioned in sub-section (2) of Sec. 17 of the Act. The said sub-section 17(2) and the Articles referred to therein are reproduced below for facility of reference :—

“ 17 (2). Articles of Association may adopt all or any of the regulations contained in Table A in the first Schedule, and shall in any event be deemed to contain regulations identical with or to the same effect as regulation 56, regulation 66, regulation 71, regulations 78, 79, 80, 81 & 82, regulation 95, regulation 97, regulation 106, regulation 107 and regulations 112, 113, 114, 115 & 116 contained in that Table :

Provided that regulations 78, 79, 80, 81 & 82 shall not be deemed to be included in the Articles of any private company except a private company which is the subsidiary company of a public company :

Provided further that regulation 107 shall be deemed to require that a statement of the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, shall be shown in the profit and loss account, unless the company in general meeting shall determine otherwise.

Art. 56. A. any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless a poll is (before or on the declaration of the result of the show of hands) demanded in accordance with the provisions of clause (c) of sub-section (1) of section 79 of the Indian Companies Act 1913.

and unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

Art. 66. The instrument appointing a proxy and the power-of-attorney or other authority (if any) under which it is signed or notarially certified copy of that power or authority, shall be deposited at the registered office of the company not less than seventy two hours before the time for holding the meeting at which the person named in the instruments proposes to vote, and in default the instrument of proxy shall not be treated as valid.

Art. 71. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the said Act, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Art. 78. At the first ordinary meeting of the company, the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year, one-third of the directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office.

Art. 79. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

Art. 80. A retiring director shall be eligible for re-election.

Art. 81. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

Art. 82. If at any meeting at which an election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of them as have not had their places filled up shall be deemed to have been re-elected at the adjourned meeting.

Art. 95. The Company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors.

Art. 97. No dividends shall be paid otherwise than out of profits of the year or any other undistributed profits.

Art. 105. The Directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors and no member (not being a director) shall have any right of inspection of any account or book or document of

the company except as conferred by law or authorised by the directors or by the company in general meeting.

Art. 107. The profit and loss account shall in addition to the matters referred to in sub-section (3) of section 132 of the Indian Companies Act, 1913, show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in cases where any item of expenditure which may in future be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

Art. 112. (1) A notice may be given by the company to any member either personally or by sending it by post to him to this registered address or (if he has no registered address in British India) to the address, if any, within British India supplied by him to the company for the giving of notice to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Art. 113. If a member has no registered address in British India, and has not supplied to the company an address within British India for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

Art. 114. A notice may be given by the company to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

Art. 115. A notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignee of the insolvent or by any like description at the address (if any) in British India supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

Art. 116. Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member of the company (including bearers of share-warrants) except those members who (having no registered address within British India) have not supplied to the company an address within British India for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or insolvency of a member, who but for his death or insolvency would be entitled to receive, notice of the meeting.

Where the Company to be formed is one limited by guarantee or is of unlimited liability, Table A does not apply *ipso facto*, in the absence of any articles framed and registered, as in the case of a company limited by shares, but separate articles must be registered in forming such companies (i.e. companies limited by guarantee or are of unlimited liability).

After the preparation of the Memorandum and Articles of Association and printing thereof as above described and more particularly discussed in the following chapters, the next step is to get each of the above documents embossed with stamps of requisite value as provided by Articles 10 & 39 respectively of the Indian Stamp Act as modified by the Provincial Act, if any. Each of them shall then be signed by every subscriber thereto, who shall also add his address and description in presence of atleast one witness who must attest the signatures. Such a witness must not himself be a subscriber to the Memorandum and Articles of Association of the company proposed to be registered.

Registration fee on the proposed authorised capital of the Company must then be deposited in accordance with the rates given in Table B of the Indian Companies Act. The documents as above prepared must then be taken to the Registrar of the Joint Stock Companies for the Province in which the registered office of the company is stated by the Memorandum to be situate, along with the receipt of the registration fee paid and a declaration by an advocate, attorney or pleader entitled to appear before a High Court who is engaged in the formation of the company or by a person named in the Articles as a director, manager or the secretary of the company as to the compliance with all the requirements of the Indian Companies Act in respect of all matters precedent and incidental to the registration of the company. Such declaration must be in the prescribed form (*Vide* Form No. 1 in Appendix B).

The documents will be filed with the Registrar, who shall, after being satisfied as to the payment of requisite stamp duty and registration fee, retain and register them and issue a certificate of corporation. The notice of the situation of the registered office of the company must then be given in the prescribed form (*Vide* Form No. 6 in Appendix B) within 28 days after the date of incorporation of the company.

CHAPTER IV. MEMORANDUM OF ASSOCIATION

A. GENERAL.

Definition as given in the Act.—The definition of 'Memorandum' as given in Section 2 (10) of the Act is not very helpful in indicating as to what a memorandum of association really is. The last-mentioned sub-section simply defines a memorandum as the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of the Act.

Fundamental document of the Company.—The Memorandum of association is the fundamental document of a company. It sets out the constitution of the company. It defines its relations with the outside world and the scope of its activities. It contains the fundamental conditions upon which the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors and the outside public, as well as shareholders.¹ It is, as observed by Cairns, L.C., in *Ashbury Railway Carriage & Iron Co* case above mentioned, a necessary charter and defines the limitation of the powers of a company to be established under the Act'. The purpose of the Memorandum is to enable shareholders, creditors and those who deal with the company to know what is its permitted range of enterprise and for this information they are entitled to rely on the constituent documents of the company.²

Memorandum & Articles of Association their relative position.—The Memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors and the outside public as well as the shareholders. The articles, on the other hand, are the internal regulations of the company³. Thus the articles of association form a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company and so accepting it they proceed to define the duties, the rights and powers of the governing body as between themselves and the company at large and the mode and form in which the business of the company is to be carried on and the mode and form in which changes in the internal regulations of the company may from time to time be made with regard to the memorandum of associations, if there is anything which goes beyond that memorandum or is not warranted by it, the question will arise whether that which is so done is *ultra vires* not only of the directors of the company but of the company itself. With regard to the articles of association if there is anything which is in keeping with the memorandum but is a violation of the articles of association or in excess of them, the question will arise whether that is anything more than an act *extra vires* the directors but *extra vires* the company. So the memorandum is, as it were, the area beyond which the action of the company cannot go, while inside that area the shareholders may make such regulations for their own government as they think fit.⁴

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1. *Ashbury Railway Carriage & Iron Co vs Riche* (1875) L. R. 7 H. L. 653; *Egyptian Salt and Soda Co vs. Port Said Salt Association* (1931) A. C. 877 & *Guinness vs. Land Corporation Ireland* (1882) 22 Ch. D. 349.
 2. Per Lord Macmillan in *Egyptian Salt & Soda Co* case referred to above.
 3. *Guinness vs. Land Corporation of Ireland* (1882) 22 Ch. D. 349.
 4. Per Lord Cairns, L. C. in *Ashbury Railway Carriage & Iron Co. vs. Riche* (1875) L. R. 7 H. L. 653 at pages 667 and 668.

It will be thus seen that the memorandum of association is the dominant documents and the articles of association are subordinate to it. But while the memorandum in fact controls the articles, yet if there is any ambiguity in the memorandum, they may be used to explain it, except in a matter which the Act requires to be in the memorandum, for which the memorandum above should be looked into. Subject to the above exception, they are to be read together so that if there is any ambiguity in the one it may be explained by the other.⁵

Accordingly where there was a provision in the memorandum of association of a company empowering it to issue with preferential rights part of the shares in its original capital thereby stated, but there was no such express provision in its articles of association, though one of its article empowered the directors to allot the shares 'on such terms and conditions as they thought fit', and there was another article vesting them with general powers. Held that the express powers given by the memorandum could be exercised by the company in the absence of an article to the contrary.⁶

B. Contents of the Memorandum.

Contents of Memorandum.—In a case of the company limited by shares the memorandum of association shall contain the following particulars:—

- (1) The name of the company with limited as the last word in its name ;
- (2) The province in which the registered office of the company is to be situate ;
- (3) The objects of the company ;
- (4) The liability of the members is limited ;
- (5) The amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount.

In case of a company limited by guarantee, the further fact that each member undertakes to contribute a certain specified amount to the assets of the company for payment of the debt and liabilities of the company contracted before he ceases to be a member and of costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, if the company is wound up while he is a member or within one year afterwards, must be set out in the Memorandum in addition to Nos. (1) to (4) above; and in case such a company has a share capital, facts contained in No (5) above should also be given. In case of an unlimited company, however, the facts mentioned in Nos (4) and (5) above should be omitted.

Besides, no subscriber to the Memorandum shall take less than one share, if the company has a share capital, and each subscriber shall in that case write opposite to his name the number of shares he takes.

We shall now examine the requirements stated above individually in detail.

I. Name of the Company.

Use of the Word 'Limited.'—The Act contains certain restrictions on the freedom of choice of the company in this respect. They are as follows:—

5. *Guinness vs. Land Corporation of Ireland* (1882) 22 Ch. D. 349; *Anderson Case* 7 Ch. D. 75; and *Angostura Bitters vs. Kerr* (1938) A. C. 550.
 6. *Campbell vs. Rafe* (1938) A. C. 91 = 102 L. J. P. C. 1.

(i) Except in the case of an unlimited company, a company must have the word 'Limited' as the last word in its name.

Exception to the above rule.—An exception in this respect is, however, provided by Section 26 of the Act, which empowers the central Government to dispense with the word 'Limited' in name of an association capable of being formed as a limited company which has been formed or is about to be formed for promoting commerce, art, science, religion, charity or any other useful object, when such association applies or extends to apply its profits (if any) or other income in promoting its objects and prohibits the payment of any dividend to its members.

Grant of License.—In the last mentioned case, a license may be granted on such conditions and subject to such regulations as the Central Government thinks fit, and those conditions and regulations shall be binding on the association and shall, if the Central Government so directs, be inserted in the Memorandum and Articles of the Association or in one of them. After the grant of the license, which must be duly applied for beforehand, an association can register itself as a company with limited liability without the use of the word "limited" and shall, on registration, enjoy all the privileges of a limited company and be subject to all its obligations except those of using the word 'Limited' as part of its name and of publishing its name and of sending lists of members to the Registrar.

Revocation of License.—The license may, however, be revoked by the Central Government at any time, whereupon the Registrar shall enter the word 'Limited' at the end of the name of the Association upon his register, and the association shall cease to enjoy the exemptions and privileges mentioned above. But before revoking the license, the Central Government shall give to the association notice of its intention so to do affording the association concerned an opportunity of submitting a representation in opposition to the revocation.

(ii) **Name of the Company must not be similar to or identical with an existing Company.**—A company must not be registered by a name identical with that of a company already in existence or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the Registrar requires—*Vide* Section 11 (1). The Registrar may, therefore, refuse registration on the ground of the similarity of names calculated to mislead or deceive the public and the Court will not interfere with his discretion in such a case⁷. It is not necessary to prove that the offending company had any fraudulent intention⁸. It is enough to prove that the two names are so similar that the adoption of the name objected to is likely to mislead⁹. If the offending company is, through inadvertence or otherwise, registered in contravention of the provisions of Section 11 (1) mentioned above, it may, with the sanction of the Registrar, change its name.

A threatened registration of an offending company may be restrained by an injunction,¹⁰ and the mere registration of such a company does not, by itself,

7. *Res V. Registrar of Companies* (1912) 8 K.B. 23.

8. *National Bank of India v. National Bank of Indore* 24 Bom L. R. 1181.

9. *Singer Machine Manufactures Co v. Wilson* () 3 A. C. 376.

10. *Hendriks v. Montague* () 17 Ch. D. 638.

afford any protection against an action for an injunction at the instance of the aggrieved party.¹¹ The principle on which the court interferes in such cases is that one person cannot be permitted to represent the business which is carried on by another and that the use of a name similar to the one in which another party carries on business is calculated to deceive or cause confusion between the two businesses, and is likely to affect the other party's property by diverting the customers, the credit and the good will of the latter's business.¹² The crux of the matter, therefore, is whether the similarity in the names of the two companies taken with the evidence satisfies the court that the defendant's company's name is calculated to deceive the public and to divert business from the plaintiffs to the defendants or to cause confusion between the two companies. Accordingly, where the plaintiffs, the Asiatic Government Security Assurance Co. Ltd., sued the defendants the New Asiatic Life Insurance Co. Ltd., claiming an injunction restraining the defendants from carrying on business under the name of "The New Asiatic Life Insurance Co. Ltd., or any other name which includes the word 'Asiatic' on the ground that it was likely to deceive and mislead the public into the belief that the defendant's company was the same as the plaintiff's company, it was held that the use of word 'NEW' in the defendant's Company's name was a decisive difference and taken along with other circumstances it could not be said that the defendants' company's name was likely to mislead. 12-(a)

(iii) A company must not, except with the previous consent in writing of the Central Government, be registered by a name which contains any of the following words, namely, 'Crown', 'Emperor', 'Empire', 'Empress', 'Federal', 'Imperial', 'King', 'Queen', 'Royal', 'State', 'Reserve Bank', 'Bank of Bengal', 'Bank of Madras', 'Bank of Bombay' or any word which suggests the patronage of His Majesty or any member of the Royal Family or any connection with His Majesty's Government or any department thereof. Vide Section 11 (3) (a). Nor shall a company be registered by a name which contains the word 'Municipal' or 'Chartered' or any word which suggests or is calculated to suggest connection with any municipality or other local authority or with any society or body incorporated by Royal Charter, except with the previous consent in writing of the Central Government as aforesaid. Vide Section 11 (2) (b). The above restrictions shall not, however, apply to the companies registered before the commencement of the present Indian Companies Act. Vide the proviso to S. 11 (3).

Apart from the above statutory restrictions, it is desirable, in view of the inconvenience caused by having too long a name, to confine the name of any company wherever practicable, to three or four words.¹³

2. REGISTERED OFFICE OF THE COMPANY.

Provisions of Section 72 and Mandatory nature thereof:—A company must have a registered office from the day on which it begins to carry on business or from the 28th day after the date of its incorporation, whichever is earlier, so that all communications and notices may be addressed to it. Notice of the situation of such registered office

11. *Tussand v. Fussand* (1890) 44 Ch. D. 678.

12. *Ewing v. Buttercup Margarine Co.* (1917) 2 Ch. 1; & *Tussand v. Fussand* quoted above.

12-(a). *Asiatic v. New Asiatic* (1939) 9 Com. Cas 208.

13. Vide *Palmer's Company Law*, 16th Edition at page 21.

must be given to the Registrar within 28 days after the date of the incorporation of the company and any change therein must likewise be notified within 28 days of the said change. On receipt of such notice, the registrar shall record the same. A company carrying on its business without complying with the above requirements, is liable to fine not exceeding fifty rupees for every day during which it so carries on business. (Vide Section 72.)

Objects of the aforesaid provisions:—The terms of Section 72 as to the registered office of company are mandatory. They enjoin the company to have a registered office, the principal object being to provide some definite place at which notices and all other communications may be served on the company. Again the place of the registered office serves to determine the question of the jurisdiction of Courts.¹⁴ A company is deemed to dwell at a place where it carries on its business and it carries on its business in the place where its chief office is situate. The place of its registered office is, therefore, important for the purpose of fixing the domicile of the company.¹⁵ The principle underlying the above rule is not that the registered office is necessarily the company's residence but that, in such a case, it is the place where the central management and control actually abide.¹⁶

Again the statement as to the place of the registered office of a company determined the place where the company is to be registered. (Palmer's Company Law 16th Edition, Page 21)

Mode of service in absence of registered office:—Section 72 of the Indian Companies Act, although it enjoins a company to have a registered office, does not make any provisions as to how notices and other communications are to be served on the company, when it has no registered office. In the last mentioned case it seems that the service at the office in fact used by the company would be enough.¹⁷ Where, however, there is no such office at all and the company, though not dissolved, has practically ceased to carry on business, service on some of the late officers may be allowed.¹⁸

3. THE CLAUSE RELATING TO 'OBJECTS'

Discretion of subscribers:—Subject to certain restrictions enumerated below, the subscribers to the Memorandum of Association are at perfect liberty to frame, in their discretion, the objects as they may choose. They should, nevertheless, be very careful in doing so for the objects determine the limits to the powers of a company, or to put it differently, the powers of the company to transact business are restricted to the objects specified in the Memorandum of Association and any act which is beyond the objects thus specified, is *ultra vires* and void.¹⁹

14. *Baels v. Public Trustee*. (1926) Ch. 868.

15. *Jones v. Scottish Accident Insurance Co.*, 17 Q. B. D. 421.

16. *De Beers Consolidated Mines Ltd v. Howe*, (1906) A. C. 455.

17. *British & Foreign Gas Generating Apparatus Co.*, In re: (1865) 13 W. R. 649; and *Fortuna Copper Mining Co.*, In re: (1879) L. R. 10 Eq. 890.

18. *Gaskell v. Chambers*, 28 L. J. Ch. 885 i

19. *Ashbury Railway Carriage Co. v. Riche*, (1875) 7 H. L. 653.

Purpose of statement of objects :—The statement of objects in the Memorandum of Association of a company is intended to serve a double purpose, viz., (1) to give protection to the subscribers, who learn from it the purpose for which their money can be applied ; and (2) to give protection to the persons dealing with the company who can infer from it the extent of the company's power ²⁰. The Memorandum of Association is, so to say, the company's charter and defines the limitation of its activities and the destination of its capital. ²¹

Limitations referred to above :—The objects of a company should not include the doing of anything illegal, immoral or contrary to public policy or in contravention of the general law, e. g., to pay dividend out of capital, to issue shares at a discount, to purchase its own shares. ²²

Objects to be set out clearly :—The objects must be set out definitely and with reasonable clearness. A mere stringing together of a large number of very wide powers is not desirable. ²³ A general statement to carry on any business which may appear to be profitable is not enough. ²⁴ Where the objects of a company are expressed in a series of paragraphs the paragraph containing the main and dominant object of the company must be found out and the other paragraphs should be treated as being merely ancillary to this main object. Usually, the first paragraph of the objects embodies the main and dominant object of the company. ²⁵ It is, however, now usual to insert in the memorandum a clause that the objects specified in each paragraph shall, except where otherwise expressed in each paragraph, be in no wise limited or restricted by reference to the terms of other paragraphs. If such clause occurs in the memorandum none of the paragraphs can be treated as containing the main or dominant object of the company as the words aforesaid are obviously intended to exclude such a construction. ²⁶

General clause :—Again it is not unusual to find at the end of the object clause in the Memorandum words to the following effect: "To do all such other things as are incidental or conducive to the attainment of the above objects or any of them". Such words have been, in certain cases, held as enlarging the company's power. ²⁷

Elaborate statement of objects :—The practice of elaborate statement of objects of the company is what is usually followed in present day drafting of the Memorandum of Association. There is nothing in the Act to prevent this course. In fact this practice is useful for more than one reason, for "the persons to whom a memorandum of association is addressed", to quote Lord Palmer, are in the main men of busi-

20. Per Lord Parker, J. in *Cotman v. Brougham*, (1918) A. C. 514 (520).

21. *Ashbury Railway Carriage Co. v. Riche*, (1875) L. R. 7 H. L. 658.

22. *Trevor v. Whitworth*, (1887) A. C. 40; *Guinness v. Land Corporation of Ireland*, (1882) 22 Ch. D. 349; *Re Fiddystone & Co* (1898) 3 Ch. 9; *Ooregam & Co. of India v. Roper*, (1892) A. C. 125; *Welton & Suffery*, (1897) A. C. 299.

23. *German Date Coffee Co., In re*: (1882) 20 Ch. D. 169.

24. *Stephen v. Mysore Reefs* (1902) 1 Ch. 745.

25. *Stephens v. Mysore Reef Supra & Haven Gold Mining Co.*, In re: (1882) 20 Ch. 161.

26. *Cotman v. Brougham*, (1918) A. C. 514 (521).

27. *Evans v. Brunner Mond & Co.*, (1921) 1 Ch. 359. But see also *Baglan Hall Colliery Co.* (1870) L. R. 5 Ch. App. 846; *Simpson v. Westminster Palace Hotel Co.*: (1860) 8 H. L. Co. 712.

ness and not lawyers and for these it is expedient that the powers of the company should as far as possible be made manifest by adequate objects and should not be left to inference or implication". (Palmer's Company Law, 16th Edition at page 23). But as stated by Lord Wrenbury in his report of the committee of which he was the Chairman an evil practice had grown up of crowding into the memorandum of association words that would cover every conceivable act which the corporation could under any circumstances desire to do. Objects were buried and concealed in an accumulated mess of powers. The resulting mischief was twofold. The intending investor who ought to have been informed with reasonable clearness as to what was the trade in which his money was to be risked; could often learn nothing except that his moneys might be used for any conceivable purpose. And the intending creditor was deprived of the advantage of knowing what his intending debtor could do and could not do in the employment of his capital.

Advantage of elaboration :—Over-elaboration, no doubt, leads sometimes to confusion and defeats its very object. It has, however, advantages of its own, for it tends to prevent doubts and difficulties which often crop up when construing a concise statement of objects. The practice of elaborate statement of objects can, therefore, find its justification in the last mentioned advantage.

Construction of the object clause in Memorandum of Association.

General Rule.—To construe a document is nothing more than to arrive at the meaning of the parties.²⁸ In order, therefore, to construe the object clause the expressed intention of the parties should be gathered from the whole document and the meaning of the words should be ascertained by according popular sense to popular words and technical sense to technical words. A memorandum of association must be read fairly and a reasonable interpretation should be placed on the language it employs. Accordingly where one of the objects of a company was to deal in salt and the export of salt was not expressly prohibited by its Memorandum of Association, it was held that the memorandum does not exclude from the permitted objects of the company the export of salt,²⁹ for a company may do anything which is fairly incidental to and consequential upon the powers specified in its memorandum unless expressly prohibited thereby.³⁰

Deviation from the above rule in certain cases :—The Court has, however, in certain cases deviated from the above rule, e.g., where one of the paragraphs (usually the first) in the memorandum appears to embody the main and dominant object of the company. In the last mentioned case, the other paragraphs have been treated as merely ancillary to the main object and as limited and controlled thereby.³¹ So where one of the objects of a company was to acquire gold mines in Mysore and elsewhere and the company wanted to work such mines on Gold Coast, it was held that as the main object of the company was to work mines in India, the word 'elsewhere', must be confined only to India and that, therefore, the company could not work mines in the

28. Per Lord Chelmsford in *Scott v. Corporation of Liverpool*, (1858) 3 De G. & J. 884 (860).

29. *Egyptian Salt & Soda Co. v. Port Said Salt Association*, (1931) A.C. 677.

30. *All. Gen. v. Great Eastern Rail Co.*, 5 A.C. 473.

31. *Haven Gold Mining Co., In re*: (1882) 20 Ch. D. 151; *Amalgamated Syndicate In re*: (1897) 2 Ch. 600

Gold Coast. ⁸² This case, however, does not appear to be good law in view of a latter decision ⁸³ though it has not been expressly overruled by the last mentioned decision. With a view, however, to provide against this narrow construction a clause is nowadays usually inserted in the Memorandum that the objects specified in each clause are independent of each other and shall, except where otherwise expressed in such clause, be in no wise limited or restricted by reference to the terms of other clauses.

4. LIMITED LIABILITY CLAUSE.

As has been stated above, one of the particulars required in the memorandum of a company limited by shares is a statement to the effect that the liability of the company is limited. The effect of such statement is that the members of the company shall not, in winding up of the same, be liable to contribute more than the unpaid liability of their shares in the company, that is to say, that they shall, in the event of the winding up of the company, be liable only to the extent of the amount still unpaid on their shares and no further, except in the case of a company falling within the purview of Section 147 of the Act. The section last mentioned is the only exception to the rule above stated and provides that if a company carries on business for more than six months with its number of members reduced to below seven, in case of a public company, and to below two, in the case of a private company, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of this fact shall be personally liable for all debts of the company contracted during the aforesaid period and may be sued for the same without joinder in the suit of any other member. (Vide Section 147).

5. CAPITAL CLAUSE.

Requirements of:—The capital clause must state the amount of the nominal or authorized capital and the mode of its division into shares i.e., the number of shares into which it is divided and the amount of each share. In fixing the nominal amount of the capital, regard must be had to the amount of money necessary to set up the proposed business and to provide sufficient working capital therefor. If, however, the company proposes to buy an existing concern and not to run a new business, the subscribers must have in view the amount required to buy such old concern and the additional amount required to keep it going. Again the amount of each share is a matter in the discretion of the subscribers to be determined according to the requirements of the company and the nature of the proposed business. If, for instance, the proposed business is a hazardous one it is better to have shares of smaller amount. Again in the case of a private company it is not unusual to have shares of large amount, in view of the limited number of its members. These and other considerations must weigh with those responsible for the promotion of the company.

Different classes of shares and rights attached thereto:—The capital is generally divided into different classes of shares, e.g., ordinary, preferential and deferred with different rights, privileges or conditions attached to them. The preference share may give a preferential right either as to dividend or both as to dividend and to return

⁸². *Stephen v. Mysore Reefs Ltd.*, (1902) 1 Ch. 745.

⁸³. *Cotman v. Brougham*, (1918) A. C. 514.

of capital in the event of the winding up. The preferential dividend may be cumulative or may be payable out of the profits, each year, i.e., non-cumulative. In the former case, if the profits of the company in any financial year are not enough to pay the dividend, the deficiency must be made up out of the profits of the subsequent year, while in the latter case the dividend is payable only out of the profits of each year. In the absence, however, of any description in the articles as to the preference shares being of either kind, the usual presumption is that they are cumulative.⁸⁴

The deferred shares receive no dividend until the preference and the ordinary shares have been paid a dividend at a certain specified rate. In fact the preference shares bear the same relation to ordinary that the latter do to the deferred, in as much as preference shares receive dividend in preference to the ordinary shares, while the latter have preference over the deferred shares in this respect. To put it differently, the ordinary shares have their dividend deferred to that of the preference shares, while the deferred shares have their dividend deferred to that of the ordinary ones. The practice of founders' or management shares is not in much favour these days, though it was a good deal in fashion in the past. The underlying idea is to use such shares to remunerate the promoters or founders of the company or the underwriters of the share capital. Such shares are ordinarily deferred ones receiving no dividend until the preference and the ordinary shares have been paid a dividend at a specified rate. They thus participate only in the surplus profits, but when such profits are large, they become very valuable. They are usually of a small nominal amount. The existence of such shares would naturally diminish the value of ordinary shares, inasmuch as in case of large profits a considerable proportion is taken by the holders of such shares.

Redeemable Preference shares :—Section 105-B of the present Act introduces yet another class of shares. The aforesaid section permits a limited company to issue preference shares redeemable after a fixed period, if the company is so authorized by its articles. The section has been introduced into the present Act by the Amending Act of 1936 and is mainly based on Section 46 of the English Companies Act, 1929. The section does not, however, authorize the conversion of issued preference shares into redeemable preference shares, for the conversion of shares already issued into redeemable preference shares is not an issue of such shares within the meaning of the Section. Such a conversion can only take place if the proper steps appropriate to a reduction of capital were taken. Consequently, the court refused to sanction a scheme of arrangement whereby a company proposed to convert issued preference shares into redeemable preference shares.⁸⁵

All such shares as are issued under the Section aforesaid must be fully paid up; and are redeemable only out of the profits of the company or out of the proceeds of a fresh issue of shares made for the purposes of redemption or out of sale-proceeds of any property of the company. If they are redeemed out of the profits or sale proceeds of any property of the company, the amount applied in redeeming the shares must be transferred out of the profits to a reserve fund to be called "the capital redemption reserve fund" which for the purposes of reduction of capital and the applicability of the provisions of the Act, relating thereto must be treated as paid-up capital. If, however, they are redeem-

84. *Foster v. Coles*, (1906) W. N. 107.

85. *St. James Court Estates Ltd. In re*: (1948) 18 Com. Cas. 213.

red out of the proceeds of a fresh issue, the premium, if any, payable on redemption must have been provided for out of the profits before they are redeemed. The balance sheet of a company which has issued such shares must include a statement specifying what part of the issued capital of the company consists of redeemable preference shares and the date on or before which those shares are, or at the option of the company are to be, liable to be redeemed, or where no definite date is fixed for redemption, the period of notice to be given for redemption. Non-compliance with the above requirement renders the company and every officer of the company who is in default liable to fine not exceeding one thousand rupees, (Section 105-B (1) & (2)). Subject to the provisions of Section 105 B, the redemption of the preference redeemable shares aforesaid may be effected on such terms and in such manner as may be provided by the Articles of the company concerned, S. 105-B (3).

Under Sub-Section (4) of Section 105-B, aforesaid, a company which has redeemed or is about to redeem any preference redeemable shares, has been empowered to issue new shares upto the nominal amount of the shares redeemed, or to be redeemed as the case may be, as if those shares had never been issued. Accordingly, in event of such an issue, the share capital of the company shall not be deemed to be increased by the issue of new shares for the purpose of calculating the fee payable under Section 249 of the Act. Where such new shares are issued, the capital redemption reserve fund may be applied by the company up to the amount equal to the nominal amount of the shares so issued in paying up unissued shares of the company to be issued to the members as fully paid-up bonus shares, Section 105-B (5).

The application of the provisions relating to the reduction of capital to "the capital redemption reserve fund," referred to above, has been adversely commented upon at page 106 of Buckley's Company Law thus :

"The application of the provisions of the Act relating to the reduction of capital to a capital redemption reserve fund created under the sub-section would also appear not to be free from difficulties, since such a reserve will be a mere book entry, whereas share capital is represented by shares the subject matter of ownership. Thus, were it proposed to pay off the reserve as being in excess of the wants of the company, to whom should payment be made, more particularly in the case of a company having several classes of shares with different rights as to dividends and re payment of capital, or where further shares have been issued and paid up since the reserve was created. Nor, in the case of a company so capitalised ; is it obvious how the due order of repayment of the capital reserve and the capital paid up on the different classes of shares is to be arrived at."

It is not at all necessary or essential to mention the different classes of shares in the Memorandum of Association. In fact, it is better not to do so and to leave this matter to the Articles of Association, for if there is no express or implied provision in the Memorandum as to rights attached to any class of shares, the company may by its articles attach such rights.³⁶ All that law requires in this respect is that the amount of the capital should be stated in the memorandum coupled with the statement as to its division into shares of a fixed amount. It is, however, not unusual to declare in the

36. *Andrew & Gas Meter Co.*, (1897) 1 Ch. 261 (C. A.).

Memorandum the different classes of shares defining the rights, privileges and condition attached thereto. This may sometime prove embarrassing to the company, for such rights etc., when set out in the Memorandum of Association without qualification afterwards become unalterable, except under a scheme of arrangement sanctioned by the Court.³⁷ The declaration of such rights and privileges in the memorandum, in case of the preference shares and founder shares, however, affords additional security against any subsequent alteration of those rights. Such rights can be altered only if it is stated in the Memorandum of association but not otherwise except to the extent stated above.³⁸

ALTERATION OF MEMORANDUM.

The Memorandum of Association forms indeed the charter of the company and can be modified only in the way provided by the statute.³⁹ This has received statutory recognition in Section 10 of the Act, which makes the conditions contained in the memorandum unalterable except in the cases and in the mode and to the extent for which express provision has been made by the Act itself. The only exception to the above rule is that mentioned in the proviso to S. 10 recently added by the Amending Act (xx of 1936), namely, that any provision in the Memorandum relating to the appointment of a manager or managing agent and other matters of a like nature incidental or subsidiary to the main object of the company shall not be deemed to be such condition as referred to above and may, therefore, be changed. The aforesaid amendment has presumably been made to provide against the designs of managers and managing agents etc. to perpetuate their office by insertion of a clause to that effect in the Memorandum. The provisions made in the Act for alteration of the Memorandum are found in the following Sections:—

S. 11 (providing for change of name); S. 12 (providing for alteration of place of registered office to another province and alteration of objects); Ss. 50, 54, 55, 66, 69 and 71 (relating to alteration of share capital, creation of reserve liability, variation of rights of holders of special class of shares; and unlimited liability of directors).

Change of name of company:—We have already discussed in the preceding part of this chapter the case in which the name of a company may be changed with the sanction of the Registrar. Apart from that, any company may, by special resolution and subject to the approval of the Central Government signified in writing change name, Section 11 (4). In case of such change, the new name is entered by the Registrar in place of the former one, and the Registrar must issue a new certificate of incorporation to meet the altered circumstances of the case. On the issue of the certificate aforesaid, the change of name is complete, Section 11 (5). This change shall not, however, affect any right or obligation of the company nor shall it render defective any legal proceedings by or against the company. Such proceedings may, after the change, be continued or commenced against the company by its new name. Section 11 (6).

37. *Ashbury v. Watson*. (1885) 30 Ch. D. 376 & 30 Bom. L. R. 197.

38. *Welsbach & Co.*, (1904) 1 Ch. 87.

39. *Ashbury v. Watson* (1885) 30 Ch. D. 376;

Change of registered office from one Province to another etc :—We shall next discuss the provision as to the change of the registered office of a company from one province to another, and as to the change of its objects.

Section 12 of the Act makes a provision for the alteration of the Memorandum so as to change the place of its registered office from one province to another, and also provides for its alteration with respect to the objects of the company.

Grounds for alteration.—The alterations aforesaid may be allowed so far as may be required to enable the company to carry on its business more economically or more efficiently; or to attain its main purpose by new or improved means; or to enlarge or change the local area of its operation; or to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or to restrict or abandon any of the objects specified in the memorandum; or to sell or dispose of the whole or any part of the undertaking of the company; or to amalgamate with any other company or body of persons.

Procedure to be adopted :—To begin with, there must be a special resolution of the company, duly passed by a requisite three-fourth majority of its members present at the meeting called after 21 days' clear notice, in respect of the alteration sought to be made in the memorandum. The alteration made by the special resolution must be got confirmed by the court by making a regular petition to it therefor, and it shall not take effect until and except in so far as it is so confirmed. Before confirming the alteration the court must be satisfied that sufficient notice has been given to every holder of debentures of the company and to any person or class of persons whose interests will, in the opinion of the Court, be affected by the alteration. The Court has further to see that either the consent to alteration of every creditor entitled in the opinion of the court to object and objecting has been obtained or his debt or claim has been discharged or has been determined or has been secured to the satisfaction of the Court. The court may, however, in case of any person or class dispense with the notice for special reasons. A certified copy of the order confirming the alteration together with a printed copy of the memorandum as altered shall be filed by the company within 3 months from the date of court's order, confirming the alteration. The registrar shall then certify the registration and issue a certificate which shall be conclusive evidence that all requirements as to the alteration and confirmation thereof have been complied with. Where, however, the alteration involves a transfer of the registered office from one province to another, a certified copy of the order confirming such change shall be filed by the company with the Registrars of each such province, who shall register the same and issue certificates of registration. In that event, the Registrar for the province from which such office is transferred shall send to the Registrar for the other province all documents relating to the company registered or filed in his office, (S. 15). If the alteration is not registered within 3 months or within such further time as may be allowed by the Court, the alteration, and order and all proceedings connected therewith shall become absolutely null and void. The Court may, however, on sufficient cause being shown, revive the order on an application made within a further period of one month, (Section 16).

Discretion of the Court:—A wide discretion has been given to the Court in the matter. It may make an order confirming the alteration either wholly or in part and on such terms and conditions as it thinks fit. (S. 13). It has, in exercising its discretion to

have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors. The Court may also, in its discretion, adjourn proceedings in order to give an opportunity for purchase of the interest of the dissentient members, provided no part of the capital of the company is expended in any such purchase. (S. 14). It will thus be seen that the exercise of the power is fenced round by safeguards which are calculated to protect the interests of creditors, the interest of shareholders and the interests of the public. Creditors are protected by express provisions. Their consent must be procured or their claims must be satisfied. The public and the shareholders are protected by the necessary publicity of the proceedings and by the discretion which is entrusted to the Court⁴⁰. The Court has, however, apart from the restrictions laid down in the Act itself, a wide discretion. If the alteration is one which is required to enable the company to do any of the seven things enumerated above, the Court can confirm it wholly or in part or else it has no jurisdiction to grant it. If, therefore, the alteration seeks to affect a total change in the company's objects and it is not clear on evidence that the company as a whole wants the alteration, the Court may refuse to confirm it⁴¹. Where, however, the proposed alteration did not affect the real object of the company and appeared to enable the company to carry on its business more economically or efficiently, it was granted⁴². Similarly where additional evidence was let in to show that a large number of trades to which it was sought to extend the company's objects were already being profitably carried on by the company and the object of the petition for extension of the objects was merely to regularise the position, it was held in appeal that the alterations in the objects should be sanctioned⁴³. It must however, be borne in mind in this connection that no alterations in the Memorandum of Association can be made, if and so far as the alteration requires a member to take or subscribe for more shares than the number held by him at the date of such alteration or in any way increases his liability as at that date unless he has agreed in writing to be bound by such an alteration, either before or after the alteration in question, (Sec. 20-A). In case of the last mentioned agreement the member concerned would obviously be bound by the alteration imposing upon him the liability to take extra shares.

40. *In Re: Jewish Colonial Trust Ltd.*, (1918) 2 Ch. 287 (299) per Eve, J.

41. *In Re: Jewish Colonial Trust Ltd.*, (1918) 2 Ch. 287; *Re: Cyclist Touring Club*, (1907) 1 Ch. 269.

42. *In Re: Scientific Poultry Breeders' Association Ltd.*, (1938) Ch. 297 101 L. J. Ch. 428.

43. *Re: Balsom Bros. (1928) Ltd.*, 104 L. J. Ch. 207.

CHAPTER V

ARTICLES OF ASSOCIATION

Meaning of the Terms:—The Articles of Association of a company may be termed the by-laws or regulations of the company. They are, unlike the Memorandum of Association, alterable by the members without the intervention of the Court. A special resolution duly passed would be sufficient to effect the desired change. Section 2 (1) of the Act defines 'Articles' thus:—

“ ‘Articles’ means the articles of association of a company as originally framed or as altered by special resolution, including, so far they apply to the company, the regulations contained (as the case may be) in Table B in the Schedule annexed to Act No XIX of 1857 or in Table A in the First Schedule annexed to the Indian Companies Act, 1882, or in Table A in the First Schedule annexed to this Act.”

Registration of Articles when not necessary and vice versa :—In case of a company limited by shares registered after the commencement of the present Act (VII of 1913), it is not absolutely necessary to register any articles, for if such articles are not registered, the Regulations in Table A annexed to the Act will automatically apply. It is, however, proper and usual to register a set of articles for the management of the company excluding Table A altogether or in part according to the individual needs of a company, and in so far as the articles do not exclude or modify the regulations in Table A, the latter will apply (S. 18). In the case, however, of a company limited by guarantee or unlimited, the articles of association signed by the subscribers to the memorandum must be registered.

While drafting the articles of association of a company, and getting them registered, the following points must always be borne in mind:—

(1). The articles must not contain anything which is against or repugnant to the provisions of the Indian Companies Act and must be rejected if they are inconsistent therewith or the general law. ¹

(2). Section 17 (2) makes it obligatory upon a company to adopt certain regulations of the Table A as it expressly provides that the Articles shall in any event be deemed to contain regulations identical with or to the same effect as the following:—

(i). Regulation 56 relating to the mode of decision of a resolution put to vote at a general meeting;

(ii). Regulation 66 relating to the deposit of instrument appointing a proxy and power of attorney relating thereto 72 hours before the time of meeting;

(iii). Regulation 71 relating to the management of the business of the company by the directors ;

1. *Peveril Gold Mines*, (1898) 1 Ch. 122 : *Welton v. Saffery*, (1897) A.C. 299 : and *Bayne v. Cork & Co.*, (1900) 1 Ch. 308.

(iv) to (viii). Regulations 78 to 82 relating to the rotation, retirement of directors, their eligibility for re-election and filling up of vacancies caused by rotation and retirements.

N. B. These Regulations (78 to 82) shall not, however, be deemed to be included in the Articles of any private company except one which is the subsidiary company of a public company.

(ix). Regulation 95 relating to declaration of dividend not exceeding the amount recommended by the directors.

(x). Regulation 97 relating to the payment of dividend only out of the profits for the year or any other undistributed profits.

(xi). Regulation 105 relating to the provisions regulating the inspection of the account books of the company by its members.

(xii). Regulation 107 relating to the requirements of the profit and loss accounts. This regulation shall be deemed to require that a statement of the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, unless the company in general meeting shall determine otherwise. Proviso second to S. 17 (2).

(xiii to xvii). Regulations 112 to 116 relating to notice to the members of their legal representatives and mode of service thereof.

(3). The Articles of Association should not be inconsistent with the memorandum as any clause in the former at variance with the latter is to that extent inoperative².

(4). The articles must be divided into paragraphs numbered consecutively and printed. They should also be signed by each subscriber of the memorandum, who shall add his address and description in the presence of at least one witness who must attest the signature. (S. 19). It may also be noted in this connection that it is not necessary that every signature should be attested by a separate person. One witness for all the subscribers would suffice, though such signature cannot be attested by the subscriber himself or by another subscriber.

(5). In the case of an unlimited company or a company limited by guarantee, if the company has a share capital, the articles must state the amount of share capital or if in either of such cases, it has not a share capital, the articles must state the number of members with which the company proposes to be registered, (Section 17 (3) and (4)).

Force of Articles of Association—whether and how far they constitute a contract:—The memorandum and articles of association, when registered bind the company and its members to the same extent as if each member had signed them and they contained a covenant by him to observe all the provisions thereof, subject, however, to the provisions of the Act. S. 21 (1). In view of the above express statutory

2. *Ashbury v. Watson*, (1885) 30 Ch. D. 876 C. A.; *Dent's case*, (1878) 8 Ch. App. 768 and *Baglan Hall Colliery Co.*, (1870) 5 Ch. App. 846.

provision, the articles of association are binding on the company as well as on the members thereof ³.

The effect of the provision is to create an obligation binding alike on the members in their dealing with the company, on the company in its dealings with the members as members, and on the members in their dealings *inter se* ⁴. But this provision is not for the benefit of the strangers or even of members in some other capacity ⁵. Accordingly, a person be member or an outsider cannot assert a right to be appointed solicitor, secretary or director by reason only of a provision contained in the articles of the company to that effect ⁶.

The last mentioned rule has, however, been slightly modified by the courts. Accordingly, it has been held that a binding contract on the terms of certain article may be implied by the acts of the parties and under certain circumstances such an implied contract may be proved, even if the articles of association are held not to constitute a contract in themselves.⁷

In Isaac's case, the articles of association provided that the qualification of a director should be the holding of shares of the nominal value of £ 1,000 and that a director should acquire the qualification shares within one month of his appointment. If he did not do so, he should be deemed to have agreed to take the said shares, which should be allotted to him forthwith. Sir Henry Isaac signed the Memorandum and Articles of Association for one share. He acted as a director for more than a year. The company went into liquidation, and the Court of Appeal held that Sir Henry Isaac had agreed with the company to take and the company had agreed to allot to him, the shares which constituted his qualifications as a director and that accordingly he was liable to be settled on the list of the contributories in respect of that number of shares. The learned Lord Justice held that the action of Sir Henry Isaac in acting as a director in addition to the terms of the articles amounted to an implied contract between him and the company. This case was later on followed in ⁸. In Beckwith's case referred to above, it was similarly held that although the provisions in the articles were only part of the contract between the shareholders *inter se*, the provisions in the articles, on the directors being employed and accepting office on the footing of them, embodied the contract between the company and the directors, and on the winding up of the company, the directors were, therefore, entitled to rank as ordinary creditors in respect of the remuneration due to them at the commencement of the winding up. The English Cases above mentioned were followed by the Lahore High Court in its recent decision⁹, wherein it has been held that an implied contract may be provided by the acts of the parties on the terms set out in the articles of association of a company. On the analogy of the principle laid down in¹⁰ a decision referred to above, it has been held that even if a particular article of a company is wide enough to make it apply to a dispute between the company and one of

3. *Gulab Singh v. Punjab Zamindars Bank Ltd.*, A.I.R. 1940 Lahore 243.

4. (1941) 11 Com. Cas. 78 *Borland Trustee v. Steel Brothers & Co.*, (1901) 1 Ch. 279 ; *Bradford Banking Co. v. Briggs*, (1866) 12 A.C. 29 ; *Oatbank Oil Company v. Crum* (1888) 8 A.C. 65.

5. *Ely v. Positive & Assurance Co.*, (1876) 1 Ex. D. 20 ; *Rother Haw Chemical Co.*, (1884) 25 Ch. D. 103.

6. *Ely v. Positive & Assurance Co.*, (1876) 1 Ex. D. 20 ; *Brown La Trinidad.*, 37 Ch. D. 1.

7. *Issac's Case*, (1892) 2 Ch. D. 198 ; and *Beckwith Case*, (1898) Ch. D. 324.

8. *In re : R. Bolton & Co.*, (1894) 3 Ch. D. 356.

9. I.L.R. 1943 Lah 28.

10. *Ely v. Positive Assurance Co. supra.*

its directors and provides for reference of such a dispute to arbitration, the article in question does not constitute for the purposes of that dispute, a written agreement for submission to arbitration¹¹.

ALTERATION OF ARTICLES

The articles of a company may, subject however to the provisions of the Act and to the conditions in the memorandum, be altered or added to at any time by special resolution, and any alteration or addition so made shall be as valid as if originally contained in the articles, and will, in turn, be subject likewise to alteration by special resolution. S. 20 (i) The principle underlying the above statutory provisions can be well understood if we bear in mind that the company are absolute masters of the internal regulations of the company, and provided they pursue the course marked out in the Act, they may alter those regulations from time to time, subject, however, to the conditions contained in the Memorandum of Association. The Memorandum of Association is as it were the area beyond which the action of the company cannot go, but inside that area they may make such regulations for their own government as they think fit¹². Thus the Act gives very wide powers of alteration. A company cannot by a clause in its articles exempt any article from liability to alteration, as the right to alter and add to the regulations is the inherent right, which cannot be got rid of by any stipulation on the part of the company to the contrary¹³. An alteration as may be retrospective in its operation can also be made in the articles¹⁴ provided such alteration does not prejudicially affect the rights of non-consenting members already existing under a contract or take away a right already accrued.¹⁵

Apart from the limitations contained in the statutory provisions (S. 20 (i) and the one above mentioned, there are other limitations recognised by courts. The leading case and the principal authority on the subject is *Allen v. Gold Reef of West Africa* referred to above and it will be well to quote the observations of Lindley, M. R. there from. At page 671, he observed as follows:—

“The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company’s memorandum of association. Wide, however, as the language is, the power conferred by it (S. 50 of the English Act corresponding to S. 20 of the Indian Act) must, like other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied and are seldom, if ever expressed.”

11. (1938) Ch 708 : (1938) 3 A. E. R.

12. Per Lord Cairn, L.C. in *Ashbury Railway Carriage & Iron Co., v. Riche*, (1875) L. R. 7 H. L. 653.

13. *Walker v. London Tramways Co.*, (1879) 12 Ch. D. 705.

14. (1900) 1 Ch. 656.

15. *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656, *British Murex Syndicate Ltd. v. Alpirton Rubber Co. Ltd.*, (1915) 2 Ch. 186; and *McArthur v. Gulf Line*, (1909) 8 C. 732.

The conditions precedent for alteration of articles, apart from the statutory conditions mentioned in S. 20 itself, are that they are to be altered *bona fide* for the benefit of the company as a whole. The phrase "*bona fide* for the benefit of the company" does not however import two different conditions : (1) that the alteration must be found to be *bona fide* ; and that in addition thereto it must, in the opinion of the court, be for the benefit of the company. The two things are not different¹⁶. If the alteration is *bona fide* it is for the shareholders and not for the court to say whether such alteration is for the benefit of the company and the court will not interfere with the judgment of the shareholders in this respect unless such view is one that no reasonable men could so regard it.¹⁷ In short, the articles must be altered in good faith and not so as to give an unfair advantage to a majority of the shareholders and the majority will not be permitted by the Court to commit a fraud on the minority.¹⁸ Again, it has been held frequently that the alteration should not constitute a breach of contract with an outsider.¹⁹ But as regards contracts between a company and its members referring to revokable articles, and specially respecting shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered²⁰, for a member is presumed to know that one of the incidents of membership of a company is that the company may, by a special resolution, *bona fide* alter its articles even though to his own prejudice.²¹ Similarly a company may alter its articles so as to vary a contract with an outsider, if the latter has made it subject to the risk of the alteration of the articles.²² Ordinarily rights which have their origin in a contract outside the articles, the terms whereof are found or referred to in such articles, can be altered by the alteration of such articles, unless one of the terms of such contract was that such rights should not be affected by an alteration of the articles.²³ Accordingly in the absence of the proof of agreement between the secretary and the company that the subsequent alteration of the articles should not affect the terms of the contract upon which the plaintiff (Secretary) took up his office, the special resolution of the shareholders modifying the articles of association and thereby curtailing the powers and emoluments of the secretary was held to be valid. (*Ibid*). Such agreement may, however, be implied²⁴. Mac Kinnon, L. J. laid down, in the last mentioned case, for the purpose:—"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying." In that case 'S' a director was appointed a managing agent for a period of 10 years by an agreement dated 21—12—33. In April 1936, the company adopted a new set of articles empowering another company (who had taken its financial control) to remove from office any of its directors. In March, 1937, the latter company in pursuance of the power aforesaid, removed S from his office of director and consequently his appointment as Managing Director *ipso facto* terminated. It was held that the removal of S from his office of director was a breach of contract, it being

16. *Sidebottom v. Kershaw Lees & Co.*, (1920) 1 Ch. 154 (163).

17. *Shuttleworth v. Cox Brothers & Co. (Maidenhead) Ltd.*, (1927) 2 K. B. 9.

18. *Menier v. Hopper's Telegraph Works*, 9 Ch. A. 350.

19. *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656 (670) and *British Murac Syndicate v. Alpertons Rubber Co.*, (1915) 2 Ch. 186.

20. Per Lindley, M. R. in *Allen v. Gold Reefs*, (1900) 1 Ch. 656 (678).

21. *Shuttleworth v. Cox Brothers & Co.*, (1927) 2 K. B. 9.

22. *British Equitable Life Assurance Co. v. Bailey*, (1906) A. C. 85.

23. *Chitambaram v. Krishna*, (1910) 38 Mad 86.

24. *Shirlaw v. Southern Foundries Ltd.*, (1939) 2 All L.R. 113 K. B.

an implied term of contract that the company would not by any alteration of its articles create any right to remove S from his position as director. Goddard, L. J. made the following pertinent observations during course of his judgment in the case:—"Further I think it must be an implied term of the contract that the company would not so alter its articles as to put it in the power of itself or of any one else to determine the contract. When one considers that, not only was the plaintiff bound to serve the company for 10 years, but also he was put under restrictive covenants of some severity, to take effect at the termination of the contract, it seems to me against all reasons to say that the parties could have intended anything except that nothing should be done by them during the currency of the agreement which would prevent or disable the plaintiff from serving out his time."

The decision in the last mentioned case was affirmed by the House of Lords by majority in *Southern Foundries Ltd. v. Shirlaw*.²⁵ The following observations made by Lord Porter during the course of his judgment in the case are worthy of note:—

"The general principle may I think, be thus stated : (1). A company cannot be precluded from altering its Articles, thereby giving itself power to act upon the provisions of the altered articles but so to act may, nevertheless, be a breach of contract if it is contrary to the stipulation in a contract validly made before the alteration. (2). Nor can an injunction be granted to prevent the adoption of the new articles; in that sense they are binding on all and sundry, but for the company to act upon them will, none the less render it liable in damages if such action is contrary to the previous engagements of the company. If, therefore, the altered articles had provided for dismissal without notice of a managing director previously appointed the dismissal would be *intra vires* the company, but would nevertheless expose the company to an action for damages, if the appointment had been for a term of (say) ten years and he were dismissed in less."

Special contracts between company and its members.--Special contracts between the company and members thereof stand on the same footing as contracts with outsiders and the same principle as is applicable to the latter would apply to such contracts, for even a shareholder must be regarded as an outsider in so far as he contracts with the company, otherwise than in respect of his shares.²⁶ Accordingly where there was a special contract between the plaintiff, one of the directors of a company, and the other director on behalf of the company with regard to his appointment as a managing director, it was held that the directors could not revoke the appointment otherwise than in accordance with the agreement and that the alteration in breach of the agreement was invalid.²⁷ But such a contract must exist outside the articles under a separate document altogether, and if it is merely found in a certain article, it would not avail.²⁸

25. See (1940) 10 Com. Cas 255.

26. *Bailey v. British Equitable Assurance Co.*, (1904) 1 Ch. (874) followed in *Harichandran Co-operative Insurance Society* 52 Cal. 289.

27. *Nelson v. James*, (1914) 2 K. B. 770 and *Shirlaw v. Southern Foundries Ltd.* (1939) 2 K. B. 206.

28. *Shuttleworth v. Cox*, (1927) 2 K. B. 9.

Jurisdiction of Court to rectify Articles :—The Court has, however, no jurisdiction to rectify the Articles of Association even on the ground of a mistake.²⁹

Notice of Meeting on the member affected by alteration essential :—The provisions of Articles form part of the contract between a member and the company, and consequently one party to the contract cannot add terms to the contract without the knowledge or consent of the other. Accordingly, where a company altered its articles by making an addition thereto to provide for the necessary means to force an expelled member to sell his shares to any person at a price to be fixed under the provisions of the Articles but the notice was withheld from such member of the meeting at which the alteration was made, it was held that the alteration in question was not binding on the member aforesaid.³⁰

Similarly where a company amended its articles by a special resolution but the notice of the meeting under Section 81 (2) did not mention that the question of amendment of articles was to come up for decision in the meeting, it was held that the irregularity was fatal to the proceedings and made the amendment invalid and *ultra vires*.³¹

Besides, no alteration in the articles can be made if the effect thereof is to cast upon a member any liability to take more shares than the number of shares held by him at the date on which the alteration was made or in any way to increase his liability as at that date to contribute to the share capital of, or otherwise to pay money to the company, unless such member has agreed in writing to be bound by the alteration, either before or after it is made, (Section 20 A). But a collateral obligation arising out of a collateral agreement to that effect imposed by the articles upon a member, which in certain events involves a liability on the part of that member to take further shares is not *ultra vires* or repugnant.³²

29. *Evan v. Chapman*, 86 L. T. 381 and *Scott v. Frank F. Scott (London) Ltd.*, (1940) Ch. 794.

30. *Madhara Ram Chandra v. Canara Banking Corporation Ltd.*, (1941) 11 Com. Cas. 78.

31. *Sardar Gulab Singh v. Punjab Zamindara Bank Ltd.*, (1940) 10 Com. Cas. 188.

32. *Agricultural Wholesale Society v. B. and D. Agricultural Society*, (1925) 1 Ch. 769.

CHAPTER VI

OTHER PRELIMINARY MATTERS

Promoters:—The promoters usually play a very important part in the formation of a company more particularly at early stages of its existence, and it would, therefore, be proper at this stage to discuss the functions, duties and liabilities of such persons commonly engaged or interested in the formation of the company.

Meaning of the term:—The term "Promoter" is a term not of law but of business usually summing up in a single word a number of business operations, familiar to the commercial world, by which a company is generally brought into existence.¹ The term "Promoter" has, however, not been specifically defined. Lord Lindley in his famous treatise on the company law defines a promoter as a person who brings the company into existence, i.e., by taking an active part in forming it or in procuring persons to join it as soon as it is technically formed, while Cockburn, C. J. In *Twy Criss v. Grant*² has defined him as one who undertakes to form a company with reference to a given project and to get it going and who takes the necessary steps to accomplish that purpose. Whether or not a person is a promoter is a question of fact, and must be determined with reference to the special circumstances of each particular case. If the facts show that a particular person has taken an active part in the formation of the company, he will be deemed to be a promoter.³

The promotion does not necessarily cease with the registration of the company, for a promoter may provide the capital of a company which may have been already incorporated.⁴

Relation of promoter to the company:—A promoter of a company stands in a fiduciary relationship to it, and is accountable to it in the same way as if the relationship of principal and agent, or trustee and *cestui que trust* had existed⁵ though the exact relation between the two is difficult to define. (Sarkar's Company Law, page 259). In the former case, Lindley, L. J. while discussing the relationship, observed as follows:—

"Although not an agent of the company, nor a trustee for it before its promotion, the old familiar principles of the law of agency and trusteeship have been extended and very properly extended to meet such cases and using the word "Promoter" to describe a person acting as James Bird did, it is perfectly well settled that a promoter of a company is accountable to it for all moneys secretly obtained by him from it just as the relationship of principal and agent or trustee and *cestui que trust* had really between them and the company when the money was so obtained."

In the last mentioned case (*Erlanger v. New Sombrero Phosphate Co.*) Lord Cairns described the position of promoters as follows:—

1. *Whaley Bridge Printing Co. v. Green*, (1880) 5 Q. B. D. 109.

2. (1877) 2 C. P. D. 541.

3. *Bagnall v. Carlton*, (1870) 6 Ch. 371.

4. *Emma Silver Mining Co. v. Lewis & Sons*, (1879) 4 O.P. D. 896 (407).

5. *Lyndey and Whigpool Co. v. Bird*, (1886) 33 Ch. D. 85 (94) and *Erlanger v. New Sombrero Phosphate Co.*, (1879) 3 A. C. 1218 (1286).

"They stand, in my opinion, undoubtedly in a fiduciary position. They have, in their hands, the creation and moulding of the company; they have the power of defining how, and who, and in what shape and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become through its Managing Directors, the purchaser of the property of themselves the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they asked to buy is the property of the promoters and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is deemed to take care that he sells it to the company through the medium of the board of directors who can and do exercise an independent and intelligent judgement on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person."

The fiduciary relationship referred to above commences as soon as the promoter begins to act for or promote the company, and extends not only to the company as constituted at the time, but also to the future allottees of shares. The result is that the disclosure of profits which a person standing in a fiduciary position is under the liability of making, must be made not only to the subscribers to the memorandum but also either to an independent board or to all the subscribers for shares.⁶

In the case last mentioned (*Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*) Lindley, M.R. made the following pertinent observations:—

"Notwithstanding all that had been said in *Enlanger v. New Sombrero Phosphate Co.*^{6a} about the duties of the promoters to furnish it with an independent board of directors, that decision does not require or indeed justify the conclusion that if a company is avowedly formed with a board of directors who are not independent, but who are stated to be intended vendors or agents of the intended vendors of the property to the company, the company can set aside an agreement entered into by them for the purchase of such property, simply because they are not an independent board. After *Solomon's Case*.^{6b} I think it impossible to hold that it is the duty of the promoters of the company to provide it with an independent board of directors if the real truth is disclosed to those who are induced by the promoters to join the company."

Such disclosures may, therefore, be made in the articles of association or in the prospectus instead.

Contracts with the promoters' principles:—Some of the principles to be kept in view in relation to contracts with promoters have thus been summarised by Lord Lindley in *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*.⁷ The first principle is that in equity the promoters of a company stand in a fiduciary relation to it, and to those persons whom they induce to become shareholders in it, and cannot in equity bind the company by any contract with themselves as promoters without fully and fairly dis-

6. In re: *British Seamless Paper Box Co.*, (1881) 17 Ch. D. 497 and *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392.

6a. (1879) 3 A. C. 1218 (1236).

6b. (1879) A. C. 22.

7. (1899) 2 Ch. 392 (422).

closing to the company all material facts which the company ought to know,⁸ is the leading authority in support of this general proposition.

The second principle is that a company when registered is a corporation capable by its directors of binding itself by a contract with themselves as promoters if all material facts are disclosed. *Solomon v. Solomon*⁹ is the leading authority for this principle.

The third principle is that the directors of a company acting within their powers and with reasonable care, and honestly in the interests of the company, are not personally liable for losses which the company may suffer by reason of their mistakes or errors in judgement,¹⁰ is the leading authority on this head.

A fourth principle not confined to companies but extending to them, is that a contract can be set aside in equity on proof that one party induced the other to enter into it by misrepresentations of material facts, although such misrepresentations may not have been fraudulent.

A fifth principle is that a voidable contract cannot be rescinded or set aside after the position of the parties has been changed, so that they cannot be restored to their former position. Fraud may exclude the application of this principle, but I know of no other exception.

Liabilities of promoters :—All secret profits made by a promoter belong to the company and he is liable to account for them.¹¹ It is, however, too much to say that whatever he acquires after he has commenced to promote the company *ipso facto* belongs to the latter. There is no such presumption of law. The question is one of fact as to whether or not he acquired as an agent or trustee for the intended company, and where the scheme throughout was that he would re-sell at a profit, the natural inference would be that he was not acting as such agent or trustee but for himself, and in the absence of any concealment fact, at the time of resale to the company, that he was the vendor, the latter could not claim the profit.¹²

Promoters not to escape liability by astuteness in drafting:—In the last mentioned case, it has been also held that the promoters cannot relieve themselves of their general equitable obligations by any astuteness in the drafting of the regulations which they prepare for their company. (*Vide* page 346 of (1914) 1 Ch. 332 referred to above), and consequently a clause usually inserting an article to the effect that no objection shall be taken on the ground that the promoter is vendor or that there is no independent board, though useful as negating any concealment of fact as to the promoter being vendor, cannot be relied upon as a complete protection.

8. *Erlanger v. New Sombrero Phosphate Co.*, (1879) 3 A.C. 1218.

9. *Solomon v. Solomon & Co.*, (1879) A.C. 22.

10. *Overend, Gurney & Co. v. Gibb*, (1872) L.R. 5 H.L. 480.

11. *Imperial Mercantile Credit Association v. Coleman*, (1872) 6 H.L. 189.

12. *Omnium Electric Palaces v. Baines*, (1914) 1 Ch. 882.

PRELIMINARY AGREEMENTS

Company not bound by pre-incorporation agreements :—When a company is formed to acquire an existing business or property or rights, it usually enters into preliminary agreements before its incorporation for the purchase of such business, property or rights or for securing the services of some manager or expert. Such agreements are entered into on behalf of the company by its promoters acting as its agents or trustees. A company is not, however, bound by agreements entered into on its behalf by promoter at any time prior to incorporation.¹³ It cannot ratify or adopt a contract so entered even after its incorporation¹⁴ though it may enter into a new one embodying the terms of the old one, as there is nothing to prevent it from entering into such a new contract to carry into effect the terms of the pre-incorporation contract.¹⁵ But see Section 27 (e), Specific Relief Act in this connection which provides an exception to the general rule. A new contract may, however, sometimes be inferred from the conduct of the parties and other circumstances.¹⁶ It is, however, not unusual and sometime even necessary that certain agreements and contracts should be made before the formation of the company. In such a case, the contract may be expressed to be made between a party and the company, the draft being initialled for the purpose of identification and placed in the office of some solicitor or lawyer. It is sometimes actually made and executed between the party concerned and some person purporting to act as Trustee for the company proposed to be floated. The latter will, in such a case, be personally bound by the contract unless he expressly protects himself from liability by including a power to rescind. The company is, however, not bound by the contract, until it has entered into a new agreement to that effect after it has been incorporated.¹⁷ Mere acting on the old contract does not make it binding on the company.¹⁸ The adoption of a preliminary agreement as the case may be is sometimes made as one of the objects of the company mentioned in its memorandum and provision is made in the articles enjoining the directors to adopt the same but this will not create any obligation or contract unless a distinctly new contract is made by which the company agrees to be bound by the terms of the preliminary agreement.¹⁹ In the last mentioned Bombay Case, Beaumont, C. J., has made the following observations in this respect :—

“It has been held many times that a company cannot be bound by a contract entered into on its behalf before the company was formed, and, in my opinion, it is not competent to bring a company into existence bound to enter into a contract with a third party, the terms of which have been arranged before the company was formed. It is for the company to consider after its formation whether it will enter into the contract or not.”²⁰

13. *Wilson & Co. v. Banker Lees & Co.*, (1901) 17 T. L. R. 473; *Melhado v. Porto Alegre Etc Rail Co.*, (1874) L. R. 9 C. P. 503; & 2 P. R. 1905

14. *Kelner v. Baxter*, (1866) L. R. 2 C. P. 174.

15. *In re : Dale and Plant*, (1889) 61 L. T. 206; *Natal Land Co. v. Pauline Colliery Syndicate*, (1904) A. C. 120 & *King v. Allen (David) and Sons Bill Posting Ltd.*, (1916) 2 A. C. 54 & *Howard v. Patent Ivory Manufacturing Co.*, (1888) 38 Ch. D. 156.

16. *In re : Johannesburg Hotel Co.*, (1891) 1 Ch. 119 and *Natal Land Co. v. Pauline Colliery Syndicate*, (1904) A. C. 120 (126).

17. *Kelner v. Baxter*, (1866) L. R. 2 C. P. 174.

18. *Re : Northumberland Avenue Hotel Co.*, (1886) 3 Ch. D. 16.

19. *North Sydney Investment Co. v. Higgins*, (1889) A.C. 263; *Kelner v. Baxter*, (1866) L. R. 2 C. P. 174; and A. I. R. 1934 Bom. 427.

20. 1934 Bom. 427 (428).

Exception provided in Ss. 23 (b) and 27 (e), Specific Relief Act :—To the rule enunciated above, an exception seems to have been provided by Sections 23(b) and 27 (e), of the Specific Relief Act. The former sub-clause provides that “when the promoters of the public company have, before its incorporation, entered into a contract, for the purposes of the company, and such a contract is warranted by the terms of incorporation, the specific performance of such contract may be obtained by the company. It has, however, been held that a contract with the promoters of the company for the purchase of its shares when it comes into being, is not a contract “for the purposes of the company” within the meaning of the aforesaid clause²¹. Sub-clause (e) of Section 27, referred to above provides that specific performance of a contract may be enforced against the company when the promoters of a public company have before its incorporation, entered into a contract provided the company has ratified and adopted the contract, and the contract is warranted by the terms of incorporation. This sub-clause clearly suggests that a public company may ratify and adopt a contract entered into on its behalf, before its incorporation, by the promoters of the company, and such a contract may be specifically enforced, if so ratified and adopted provided it is warranted by the terms of the incorporation. The English decisions referred to above would, therefore, stand modified in their applicability to public companies in India, to the extent mentioned in aforesaid Sections of the Specific Relief Act.

21. *Imperial Ice Manufacturing Co. Ltd. v. Manchestershaw*, 18 Bom. 415.

CHAPTER VII

INCORPORATION AND COMMENCEMENT OF BUSINESS

Documents to be filed with Registrar for getting a company registered.—As stated in chapter III above, the Memorandum and Articles, (if any) of the company proposed to be registered must be filed with the Registrar for the province in which the Registered office of the company is stated to be situated in the Memorandum (S. 22). A declaration by an advocate, attorney or pleader entitled to appear before High Court who is engaged in the formation of the company or by a person named in the articles as a director, manager or secretary of the company to the effect that all the requirements of the Act in respect of registration and matters precedent and incidental thereto have been complied with must also be filed with the Registrar, who must accept such declaration as sufficient evidence of such compliance (S. 24 (2)). Besides, in case of a public company, the applicant must also file with the Registrar a consent in writing to act as such director, and (ii) must have either signed the memorandum for a number of shares not less than his qualification or taken from the company and paid or agreed to pay for his qualification shares, or signed and filed with the Registrar a consent in writing to take from the company and pay for his qualification shares, or made and filed with the Registrar an affidavit to the effect that a number of shares, not less than his qualification, are registered in his name. The Registrar shall, thereupon, subject however, to the proper stamp duty having been paid, register the company and shall certify under his hand that the company is incorporated and issue the certificate of incorporation, which shall be conclusive evidence of all requirements having been complied with (Section 24).

Effect of certificate of incorporation.—From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum and all such persons as may become the members of the company from time to time shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal (Ss. 23 & 24). The reason of the rule as to the conclusiveness of the certificate of incorporation is only described by Lord Cairns in the famous *Reel's Case*.¹ as follows :—

“When once the Memorandum is registered and the company is held out to the world as company undertaking business, willing to receive shareholders and ready to contract engagements, then it would be of the most disastrous consequences, if after all that has been done, any person was allowed to go back and enter into an examination (it might be years after the company had commenced trade) of the circumstances attending the original registration and the regularity of the execution of the document.”

COMMENCEMENT OF BUSINESS

Conditions precedent to commencement of business or exercise of borrowing power:—Though a company becomes a legal entity on incorporation, it cannot (except when it is a private company or a guarantee company without a share capital) commence any business or exercise any borrowing power unless all the conditions given below and detailed in Section 103 of the Act are first complied with :—

1. In re : *Barned's Baking Co.*, (1867) 2 Ch. App. 674 (682).

- (i) Shares not less than the minimum subscription to be paid in cash must have been allotted.
- (ii) Every director of the company has paid to the company on each of the shares taken or contracted by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription.
- (iii) There has been filed with the Registrar a duly verified declaration by the secretary or one of the directors, in the prescribed form that the above requirements have been complied with.
- (iv) There has been filed with the registrar a statement in lieu of prospectus, in case of a company which does not issue a regular prospectus inviting the Public to subscribe for its shares. When the conditions enumerated above have been complied with, the Registrar shall certify, on the filing of the duly verified declaration as aforesaid, certify that the company is entitled to commence business and such certificate shall be conclusive evidence that the company is so entitled. The Registrar shall not, however, in the case of a company which does not issue a prospectus, give such a certificate unless a statement in lieu of prospectus has been filed with him. (Section 103 (2)).

Penalty for non-compliance with provisions of S. 103 :—Non-compliance with the aforesaid provisions of Section 103 renders every person responsible for the contravention to fine not exceeding five hundred rupees for every day during which the contravention continues (Section 103 (5)).

Nature of contracts made before the company is entitled to commence business.—The restrictions on commencement of business aforesaid do not, however, mean that company may not enter into any contract unless the provisions of S. 103 have in the first instance, been complied with. The company can, nevertheless, make contracts in respect of its intended business even before the date at which it is entitled to commence business. Such contracts shall, however, be provisional only and shall not be binding on the company till the date aforesaid, but shall become binding on that date (S. 103 (3).) The word "provisional" means that contract is to be read as if it contained a provision that it should not be binding on the company unless and until the company became entitled to commence business.²

PROSPECTUS AND STATEMENT IN LIEU THEREOF.

The issue of a prospectus is, perhaps, one of the most important events connected with a Public Limited Company. It is a document by which an invitation is made to the public to subscribe for or purchase the shares or debentures of such a company. It is thus a means to acquire the necessary capital for the company. It may be issued either before or after the incorporation of the company, but in actual practice the company is almost invariably got registered before issuing the prospectus. A form of application for shares or each class of them in case they have been issued in different classes usually accompanies the prospectus and where any debentures are also to be issued, another form of application for such debentures is also annexed thereto.

2. In re : *Otto Electrical Manufacturing Company (1905) Ltd.* (1906) 2 Ch. 890.

Meaning of the term "Prospectus":—According to Section 2 (14) of the Act "Prospectus" means any prospectus, notice, circular, advertisement or other invitation offering to the public for subscription or purchase any share or debenture of a company, but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed. The gist of the definition is the offer to the "public". The last mentioned word has, however, not been defined in the Act, and it is difficult to attach any definite meaning thereto. While offers made to a limited class of persons e.g., the distribution of 3,000 copies of prospectus among shareholders in a group of companies have been held to be offers to the public⁴, the friends of the directors and existing members have been held not to be within the category of "public"⁵.

Not a prospectus:—Again, a document prepared and issued in the following circumstances was held not to be a prospectus. The Managing Director of a company, in need of further capital, prepared a document stating the position of the company and that it was proposed to issue 20,000 preference shares and giving estimate of profits. To this was attached an application for preference shares. The document aforesaid was also signed by the other directors. Another document was also prepared by them written on the company's paper and addressed to a fellow director marked "strictly private and confidential," which after setting out the amount of the nominal and issued capitals, stated the purposes for which the additional capital was required and concluded as follows:—"I shall be very happy to discuss this proposition in all its details with any one who is really interested." A person, who on the faith of the statements contained in the aforesaid documents subscribed for 3,000 shares in the company, subsequently ascertaining that a considerable part of the issued capital had been issued, otherwise than for cash, a fact which was not stated in either of the documents, sued the managing director of the company for the loss sustained by him through the omission of the Managing Director to comply with the requirements of Section 81 (1) (c) [S. 91 (1) (c) of the Indian Act]. It was held, on the above facts, that the documents aforesaid were not issued as a prospectus within the meaning of the section above mentioned.⁵

Exact definition difficult:—As rightly observed by Messrs. Sarcar & Sen in their famous commentary on the Indian Companies Act at page 26, 'it is difficult to give any rigid or exact definition and the question as to whether a particular document is a prospectus or not would have to be decided on consideration of various factors such as numbers circulated or printed, number of persons to whom it is sent, the circumstances in which such persons receive it and the character of the contents of the documents. If it amounts to an invitation it would be a prospectus although it may have been issued to a defined class of public.'

A document offering shares or debentures of a company for sale to the public is, for all purposes, to be deemed to be a prospectus issued by the company and all rules of law relating to prospectus shall apply thereto. Section 98A.

Filing of Prospectus.—Every prospectus issued by or on behalf of a company shall be dated and that date shall be taken as the date of its publication. A copy

8. In re : *South of England National Gas and Petroleum Co.*, (1911) 1 Ch. 578.

4. *Sherwell v. Combined Incandescent Mantles Syndicate Ltd.*, 23 L. T. R. 482 & *Lindley v. Wash*, (1928) 2 K. B. 93.

5. *Nash v. Lynde*, (1929) A. C. 158 : 98 L. J. K., B. 127.

thereof signed by every person who is named therein as a director or proposed director of the company or by his agent authorized in writing shall be filed with the Registrar on or before the date of its publication. The prospectus cannot be issued to the public unless a copy thereof has been filed with the Registrar for registration as mentioned above. Every prospectus shall state on the face of it that a copy has been filed for registration with the Registrar, and if a prospectus is issued without a copy thereof being so filed, the company and every person who is knowingly a party to the issue of the prospectus shall be liable to fine not exceeding rupees fifty per day from the date of issue of the prospectus until a copy thereof has been so filed. (Section 92).

Contents of Prospectus —The preparation of a prospectus involves considerable skill and responsibility. As it is in the nature of an appeal to the public for the capital required for the company, the success whereof depends to a large extent on the attractiveness of the document, it must, on the one hand, be made as attractive as possible, while on the other hand, it should not contain untrue statements or even vague statements of vital facts nor should it conceal any material fact or circumstance.⁶ While everything must be stated therein with strict and scrupulous accuracy, it should not omit any such fact, the existence of which might in any degree affect the nature, or extent or quality, of the privileges and advantages which it holds out as inducement to take shares.⁷ Again it should be so framed as to comply with the general law and provisions of the Indian Companies Act relating thereto and more particularly Sections 93 to 96, which are reproduced below for ready reference:—

93. (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state:—

- (a) the contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company and the number of redeemable preference shares intended to be issued with the date or, where no date is fixed, the period of notice required and the proposed method of redemption; and
- (b) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and
- (c) the names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers and managing agents or proposed managing agents (if any) and any provision in the articles or in any contract as to the appointment of managers or managing agents and the remuneration payable to them; and
- (d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount (if any) paid on the shares so allotted; and

6. *Central Railway of Venezuela v. Kisch*, (1867) L. R. 2 H. L. 99.

7. *Henderson v. Lacon*, (1867) 5 Eq. 249 (262).

- (e). the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which these shares or debentures have been issued or agreed to be issued ; and
- (ee). where any issue of shares or debentures is under-written, the names of the under-writers, and the opinion of the directors that the resources of the under-writers are sufficient to discharge the underwriting obligations ; and
- (f). the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor ; Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors ; and
- (ff). where any property referred to in clause (f) has within the two years preceding the issue of the prospectus been transferred by sale, the amount paid by the purchaser at each such transfer so far as the information is available and, where any such property is a business, the profits accrued from such business, during each of the three years immediately preceding the issue of the prospectus or during each year of the existence of the business if less than three years so far as the information is available, a balance sheet of the business concerned made up to a date not more than ninety days before the date of the issue of the prospectus shall be appended to the prospectus ; and
- (g). the amount (if any) paid or payable as purchase-money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill ; and
- (h). the amount (if any) paid within the two preceding years or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or as discount in respect of shares issued, showing separately the amount, if any, so paid to the managing agents : Provided that it shall not be necessary to state the commission payable to sub-under writers ; and
- (i). the amount or estimated amount of preliminary expenses ; and
- (k). the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment ; and
- (l). the dates of, and parties to, every material contract including contracts relating to the acquisition of property to which clause (f) applies, and a reasonable time and place at which any material contract or a copy thereof may be inspected : Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract (except a contract appointing or fixing the remuneration of a managing director or managing agent) entered into more than two years before the date of issue of the prospectus ; and
- (m). the names and addresses of the auditors (if any) of the company ; and
- (n). full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all

sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company ; and

- (o) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to the several classes of shares respectively ; and
- (p) where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend, speak or vote at meetings of the company or of the right to transfer shares, or upon the directors of the company in respect of their powers of management, the nature and extent of those restrictions.

(1A). Where the prospectus is issued by a company which has been carrying on business prior to the issue thereof, the prospectus shall set out the following reports in addition to the matters referred to in sub-section (1) namely :—

- (i) a report by the auditors of the company with respect to the profits of the company including its subsidiary companies, if any, so far as the information is available in each of the three financial years immediately preceding the issue of prospectus and with respect to the rates of the dividends, if any, paid by the company on each class of shares in the company for each of the said three years giving particulars of each such class of shares on which such dividends have been paid and the source from which the dividends have been paid and particulars of the cases in which no dividends have been paid on any class of shares for any of those years, and if no accounts have been made up for any part of a period of three years ending on a date three months before the issue of the prospectus containing a statement of that fact ;
- (ii) if the proceeds or any part of the proceeds of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by an accountant or accountants holding the certificate referred to in section 144 who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus ;

Provided that if, in the case of a company which has been carrying on business for less than three years, the accounts of the company have been made up only in respect of two years or any shorter period, this subsection shall have effect as if references to two years or such shorter period were substituted for references to three years.

(1B). The statement referred to in clause (ff) of sub-section (1) and the report referred to in sub section (1A) with respect to the profits of a company or business shall show clearly the trading results and all charges and expenses incidental thereto excluding income or profits having no relation to the trading for the period covered and excluding also items of profit or income of a non-recurring nature but including amounts appropriated from profits to such purposes as payment of taxation or reserves.

(1C). Where any part of the sums required for the matters set out in sub-section (2) of section 101 is to be provided out of sources other than share capital particulars of the amount to be so provided and the sources thereof.

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum, or the signatories thereto, and the number of shares subscribed for by them.

(3) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons.

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions and addresses of directors or proposed directors, and of managers or proposed managers, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

Provided that the said requirements, except the requirements as to the amount or estimated amount of preliminary expenses, shall apply to a prospectus filed in pursuance of section 154.

(5) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

94. For the purposes of section 93 every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase or for any option of purchase, of any property to be acquired by the company, in any case where :—

- (a) the purchase-money is not fully paid at the date of issue of the prospectus ; or
- (b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus ; or
- (c) the contract depends for its validity or fulfilment on the result of that issue.

95. Where any of the property to be acquired by the company is to be taken on lease, section 93 shall apply as if the expression "vendor" included the lessor and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included the sub-lessee.

96. (1) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirements of section 93, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

(2) It shall not be lawful to issue any form of application for the shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of Section 93 ;

Provided that this sub-section shall not apply if it is shown that the form of application was issued either :—

- (a) in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures ; or
- (b) in relation to shares or debentures which were not offered to the public.

If any person acts in contravention of the provisions of this sub-section, he shall be liable to a fine not exceeding five hundred rupees.

Where a document is deemed to be a prospectus under the provisions of Section 98-A (1), it must state, in addition to the particulars required by section 93 (i) the net amount of the consideration received or to be received by the company in respect of the shares or debentures offered for sale, and (ii) the place and time at which the contract, under which the said shares or debentures have been or are to be allotted, may be inspected. Section 98-A is reproduced below for facility of reference :—

- “98-A. Document offering shares or debentures for sale to be deemed a prospectus.**—(1) Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company and all enactments and rules of law as to the contents of prospectus and to liability in respect of statements in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of misstatements contained in the document or otherwise in respect thereof.
- (2) For the purposes of this Act, it shall, unless the contrary is proved, be evidence that an allotment of or an agreement to allot shares or debentures was made with a view to the shares or debentures being offered for sale to the public, if it is shown :—
- (a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot ; or
 - (b) that at the date when the offer was made the whole of the consideration to be received by the company in respect of the shares or debentures had not been so received.
- (3) Section 97 shall apply to the person or persons making the offer as though they were persons named in a prospectus as directors of a company, and the provisions of section 93 shall have effect as if it required a prospectus to state, in addition to the matters required by that section to be stated in a prospectus :—
- (a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates ;
 - (b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.
- (4) Where a person making an offer to which this Section relates is a company or a firm, it shall be sufficient if the document aforesaid is signed on behalf of the company or firm by all directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign by his agent authorised in writing”.

Effect of misrepresentation in the prospectus.—Section 93 (5) distinctly provides that the Section shall not limit or diminish any liability which any person may incur under the general law or this Act apart from the section. Thus a shareholder who has been misled into taking shares has his remedy under the general law, apart from those provided in the Act itself.

Remedies of shareholder under the General Law :—The remedies can be classified under three headings : (i) he may apply for the rectification of the Register of Members ; and (ii) he may rescind the contract of shares and claim damages against the company and its directors on the ground of deceit practised upon him ; and (iii) he may take criminal proceedings against the directors.

We shall take these remedies one by one and discuss them separately.

(i) Shareholder's right against the company to claim rectification :—

If there is a material misrepresentation in the prospectus upon which a shareholder relied when applying for his shares, he is entitled, if he seeks relief within a reasonable time after learning the truth and before the company is in liquidation, to have his name removed from the Register of Members and the amount he has paid upon those shares returned to him with interest from the time of payment.⁸

In the last-mentioned case the refund of money paid upon the shares was ordered by the Court with interest at 4 per cent. So also, where the prospectus did not disclose certain material facts, the plaintiff was held entitled to rescission of contract.⁹ The repudiation or avoidance of contract by the shareholder must be within a reasonable time and before the commencement of proceeding of winding up of the company. The reason for this rule is not far to seek. If a shareholder does not within a reasonable time exercise option of avoiding the contract for the purchase of shares of a company on the grounds of fraud or misrepresentation, a presumption arises that he waives his right to avoid the contract. Moreover, during the normal working of a company, the right and interest of third persons come into existence who, not being parties to the contract for the purchase of shares, remain unaffected by the right that the purchaser of the shares may have against the company. It is on this ground that it has been held that the right to avoid an agreement for the purchase of shares cannot be exercised after the proceedings for winding up of the company have been initiated.¹⁰ It is, however, only the original shareholder who applied for the shares on the faith of the prospectus, and not the purchaser from him who can obtain damages or rescission of the contract,¹¹ unless the prospectus was in fact issued with a view to induce persons to become purchasers of shares. In the last-mentioned case the directors and other persons issuing the prospectus with the object afore said will become liable for losses suffered by those who bought shares even from strangers.¹²

(ii) Rescission or Contract ;—This remedy is available to a shareholder who has been induced to take shares as the result of misrepresentation made in the prospectus. Subscriber to the Memorandum cannot, however, avail of this remedy. Any other shareholder can obtain this relief provided he acts promptly.

A mere non-compliance with any of the terms of Section 93 does not give rise to the claim for rescission. It is only where shares or debentures are subscribed for on the

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8. *Scottish Petroleum Co.* (1885) 23 Ch. D. 413; and *Metropolitan Coal Consumers Association v. Karberg's case*, (1882) 3 Ch. 1.
 9. *Coles v. White City* (1927) 45 T. L. R. 230 C. A.
 10. A. I. R. 1938 All 193; I. D. L. R. 1938 All. 301 in which *metr. Scottish Petroleum Co.* (1883) 23 Ch. D. 413 at 434 and *Oakes v. Tuquand*, (1867) 2 H. L. 325 were referred to with approval.
 11. *Peck v. Gurney*, (1874) L. R. 6 H. L. 377.
 12. *Andrews v. Mochford*, (1896) 1 Q. B. 372.

faith of a prospectus containing a misrepresentation that the allottee is entitled to repudiate the shares and claim refund for his money paid. The reason of the rule is that a contract induced by a material misrepresentation is voidable and may at the option of the party deceived, be rescinded. It makes no difference that the misrepresentation was an innocent one or was made by the agents of the company and was not contained in the prospectus.¹³ The person aggrieved must, however, act promptly for an allottee of shares who discovers that he has been deceived, is bound to make up his mind at once as to whether he will rescind the contract or not, or else he may lose his right to rescind, for the right of rescission may be lost by acquiescence.¹⁴ Where a person has contracted to take shares in a company and his name has been placed on the register, it has always been held that he must exercise his right to repudiation with extreme promptness after discovery of fraud or misrepresentation.¹⁵ On the same principle he may also lose his right to rescind by an implied ratification as for instance by endeavouring to sell his shares,¹⁶ by receiving dividend, or by paying calls,¹⁷ or by attending general meetings and voting thereat.¹⁸

The relief of rescission may also be claimed by a person after his shares have been forfeited for his failure to pay calls, and in which case promptness in seeking relief is not of the same importance, for he ceases to be a shareholder and becomes a mere debtor of the company, and if he has done nothing to affirm his contract, he may repudiate it and defend action for calls on the ground of fraud.¹⁹

What may amount to misrepresentation?—A shareholder may, while claiming rescission, also claim damages against the company but he cannot both retain his shares and bring an action for damages,²⁰ and with the claim of rescission and damages against the company claim for damages against the directors may also be joined and there is nothing to prevent such joinder.²¹ In such an action, the plaintiff must prove material misrepresentation and that he has relied thereupon while purchasing his shares and suffered loss. The misrepresentation must be one of fact.²²

Material misrepresentation is a question of fact to be determined on the facts of each case. In an honest prospectus, many facts and circumstances may be lawfully omitted, although some subscribers may be of opinion that these would have been of materiality as influencing the exercise of their judgement, while on the other hand if by a number of statements a false impression is given so as to induce a person to act upon it, it is not the less false, although if one takes each statement by itself, there will be a difficulty in showing that any specific statement is untrue.²³

13. *Smith's case* () 2 Ch. App. 604 (615); *London and Stafford Shire Co.*, (1888) 24 Ch. D. 149 and *Hillo Manufacturing Co v. Williamson*, (1911) 28 T. L. R. 164.

14. *Ex parte Briggs*, 1 R. I. E. Q. 483.

15. *Aaron's Reef v. Twiss*, (1896) A. C. 213 at page 294 per Lord Davey.

16. *Ex parte Briggs*, 1 E. Q. 483.

17. *Schulcy v. Central Rail Co. of Venezuela*, 9 E. Q. 266.

18. *Sharpley v. South and East Coast Railway Co.* 2 Ch. D. (63).

19. *Aarons Reef v. Twiss*, (1896) A. C. 273

20. *Houldsworth v. City of Glasgow Bank*, (1880) 5 A. C. 317.

21. *Frankenburg v. Great Horseless Carriage Co.*, (1900) 1 Q. B. 504 C. A.

22. *Eagle's Field v. Marques of Londonderry*, 4 Ch. D. 702.

23. *Aaron's Reef v. Twiss*, (1896) A. C. 273 at page 287 per Lord Watson; and at page 281 per Lord Halsbury.

Rescission on...of untrue statement apart from misrepresentation:—Again, a statement may be true when made but may not be true when the shares were allotted, owing to some change in the prospectus. In a recent Madras case ²⁴ a question arose whether the plaintiff was entitled to revoke his application for shares in a company on the ground that before the date of allotment, but after the date of application, the prospectus was changed in material particulars viz., minimum subscription was reduced from Rs. 40,000/ to Rs. 10,000/-. It was held that he was entitled to refuse to take the shares allotted to him after the aforesaid change. It was further held that in such a case it was unnecessary to prove misrepresentation or fraud.

In another case of the same High Court where a plaintiff shareholder sought to rescind his contract for shares on the ground that two of the directors mentioned in the prospectus had retired before the allotment of shares, and that if the fact of their resignation had been communicated to him before his shares were allotted, he would have rescinded the contract and claimed refund, it was held that the plaintiff was entitled to decree for refund of his money with interest.²⁵ In the last mentioned case, it was pointed out that until the allotment of shares, the plaintiff has a right to withdraw his offer, if there should be any breach in the terms of the contract published in the prospectus. What the duty of the company in the circumstances mentioned in the Madras cases referred to above would be is clearly stated in a leading case ²⁶ on the subject, wherein Malin, J., V. C., made the following observation :—

“I do not think that there was dishonesty when the prospectus was issued, because it was believed that Mr. Gibson and Mr. Ross would act, but when the company found that these gentlemen would not act, they were bound to issue a new prospectus containing other names, and to inform those who had applied for shares that before the allotment was made other directors had been appointed and then it would be for the applicants for shares to say, under those circumstances, whether they would adhere to their offer or would withdraw it.”

The reason is not far to seek. If an application for shares is made on the faith of a statement which is true when made but which is not true when the shares are allotted, the applicant may refuse to take shares.²⁷

iii. Criminal Proceedings against Directors.—He may take criminal proceedings against the directors on general grounds of deceit practised on him or under Section 282 of the Indian Companies Act which runs as follows :—

“ 282. **Penalty for false statement.**—Whoever in any return, report, certificate balance-sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.”

24. A. I. R 1942 Madras 656

25. A. I. R. 1980 Madras 325.

26. *Scottish Petroleum Co. (Anderson case)* (1881) 17 Ch. D. 878.

27. Observation in Lindley's book on Company. Law quoted with approval in A. I. R. 1980 Madras 825.

Apart from the remedies referred to above, he has a statutory remedy for proceeding against the Directors etc., under section 100 of the Indian Companies Act which runs as under:—

" 100. Liability for statements in prospectus.—(1) Where a prospectus invites persons to subscribe for shares in, or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus and every person who has authorised the naming of himself and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus, for all loss or damage they may have sustained by reason of any misleading or untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith unless it is proved :—

- (a) with respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true ;
- (b) with respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report of valuation : Provided that the director, person named as director, promoter, or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it ; and
- (c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document : or unless it is proved :—
 - (i) that having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent ; or
 - (ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave a reasonable public notice that it was issued without his knowledge or consent ; or
 - (iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.
- (2) Where a company existing at the commencement of this Act has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein unless he has authorised the issue of the prospectus, or has adopted or ratified it.

- (3) Where the prospectus contains the name of a person as director of the company, or as having agreed to become a director thereof, and has not consented to become a director or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof shall be liable to indemnify the person named as aforesaid against all damages, costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any suit or legal proceedings brought against him in respect thereof.
- (4) Every person who, by reason of his being a director or named as a director, or as having agreed to become a director or his having authorised the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not guilty of fraudulent misrepresentation.
- (5) For the purposes of this section:—
 - (a) the expression “promoter” means a promoter who was a party to the preparation of the prospectus, or the portion thereof containing the misleading or untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company ;
 - (b) the expression “expert” includes engineer, valuer, accountant and any other person whose profession gives authority to a statement made by him.”

Besides, for wrong statements in the prospectus as also for wilful omissions of facts required to be stated therein, persons responsible there for may be proceeded against under Section 97 of the Indian Companies Act. which deals with non-compliance with the provisions of Section 93, and provides penalty therefor. Section 97 runs as under :—

“97. Saving in certain cases of non-compliance with section 93.—1. If a prospectus is issued which does not comply with the provisions of Section 93, every person who is knowingly responsible for the issue of such prospectus shall be liable to a fine not exceeding fifty rupees for every day from the day of the issue of the prospectus until a copy complying with the requirements of Section 93 is filed.

- (2) In the event of non-compliance with or contravention of any of the requirements of Section 93, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention if he proves that :—
 - (a) as regards any matter not disclosed, he was not cognisant thereof ; or
 - (b) the non-compliance or contravention arose from an honest mistake of fact on his part ; or
 - (c) the non-compliance or contravention was in respect of matters which in the opinion of the Court were immaterial or was otherwise such as ought in the opinion of the court having regard to all the circumstances of the case, reasonably to be excused.

Provided that, in the event of non-compliance with or contravention of, the requirements contained in clause (n) of sub-section (1) of Section 93, no such director or other person shall incur any liability in respect of the non-compliance or contravention unless it be proved that he had knowledge of the matters not disclosed.”

Statement in lieu of prospectus:—A company except a private company or a company which has allotted any shares, or debentures before the commencement of the Act (VII of 1913) or a company limited by guarantee and not having a share capital which does not issue a prospectus cannot allot any of its shares or debentures unless it issues a statement in lieu of prospectus and files the same with a Registrar duly signed as required by Section 98 of the Act. The object of such statement is to give publicity in the case of a company referred to above as to the essential matters of its constitution. For matters and other particulars require to be stated in such statement, reference may be made to form No. II given in the 2nd Schedule annexed to the Act. An allotment made in contravention of the provisions of Sec. 98 referred to above, is voidable at the instance of the allottee within one month of the holding of the statutory meeting of the company, or within one month of the date of allotment in a case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting. It shall be so voidable notwithstanding that the company is in course of being wound up. (S. 102 (1).) Besides, if any director of the company knowingly contravenes or permits or authorises the contravention of any of the provisions of S. 98 with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby. The limitation for recovering any such loss, damages or costs is, however, two years from the date of allotment and such proceedings cannot, therefore, be commenced after that period. (Section 102 (2).)

Effect of untrue statement in the statement in lieu of prospectus:—The Act makes no mention of the liability arising from untrue statements in the statement in lieu of prospectus but, on general principles of law, if such document contains a false statement, a person buying shares on the faith of that statement may have a right to rescind the contract,²⁸ though a person who had not seen the statement before he took the shares or who did not rely thereupon while taking the shares would have no grievance and cannot claim rescission. Inaccuracies, mis-statements or omissions in the statement in lieu of prospectus do not, however, vitiate an allotment. So if a statement in lieu of prospectus is filed with the Registrar, the company can proceed to allotment notwithstanding mis-statements and omissions contained therein. (*Ibid*). The question whether the allotment of shares and debentures before a company has filed the statement in lieu of prospectus was considered and discussed in²⁹ but was left undecided. It seems, however, that the allotment of shares in such a case would not be wholly illegal and void. An allottee may be estopped from his conduct from denying that he is a member.³⁰ As Section 100 of the Act does not apply to a statement in lieu of prospectus, the person aggrieved would not be entitled to compensation under the aforesaid Section, though he would be entitled to damages under the general law for deceit and in having acted on the faith of misleading or untrue statement contained in the statement in lieu of prospectus. Besides, a person responsible for the issue of a statement in lieu of prospectus, would expose himself to a criminal liability under Section 282 of the Act quoted *in extenso* above.

Alteration of terms of contract mentioned in prospectus or statement in lieu thereof:—Section 99 of the Act provides that a company shall not at any time vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus except subject to the approval of the company in general meeting.

28. *Blair Openheath Furnace Co.* (1914) 1 Ch. 390,

29. *Jubilee Cotton Mills v. Lewis* (1924 A. C. 958),

30. *James Burton & Sons* (1927) 2 Ch. 132.

CHAPTER VIII

MEMBERSHIP & REGISTER OF MEMBERS.

MEMBERSHIP OF A COMPANY

Who are members :—Section 30 of the Act defines the term 'member'. According to it they are divided into two categories :—

(i) In the first category fall those who are subscribers to the memorandum. They are deemed to have agreed to become members of the company and as soon as the company is registered they are entered as such in its Register of Members.

(ii) Every other person who agrees to become a member of a company and whose name is entered in its Register of Members. Thus a person who subscribes to a memorandum of a company *ipso facto* becomes a member of that company and is treated under an obligation to take the number of shares he has signed for therein. In his case no allotment is necessary. The subscribers of the memorandum of a company are to be treated as having become members of the company by the fact of the subscription.¹ And even omission to enter their names on the Register of Members does not absolve them from their liability as such.² Further, the liability of signatory to the memorandum of association for unpaid amount due on his shares can be enforced in the winding up, in the event of the company going into liquidation. The liquidator can, in such a case, make a call upon him for what is due and the court can enforce such call without requiring the liquidator to institute a suit.³ The object of making this special provision in the Act is that the public may rely with confidence on the subscribers of the memorandum becoming members of the company.⁴ The mere signing of the duplicate of the memorandum after the registration of the original by a person does not thereby make him a subscriber.⁵

Besides the kinds of members referred to above a person may acquire membership by transfer of shares to his name in the manner provided by Articles of Association of the company, as also by succession to the shares of a deceased or bankrupt members and finally by holding out to the public or allowing himself to be held out as a member of the company and thus allowing his name to be on the Register of Members.

Membership by subscription to the Memorandum :—As discussed above, in case of subscriber to the Memorandum, no allotment is necessary,⁶ as he is bound to take the shares from the company to the extent mentioned in the memorandum and to pay for them on calls duly made.⁷ In a Madras Case⁸ it has, however, been held that there must

1. *Official Liquidator v. U.P. Oil Mills*, 55 All. 417.

2. *In the matter of Chandler & Co.*, 48 All. 580.

3. *Ramabhadram Manickam*, (1941) 11 Com. Cas. 70.

4. *Evans' Case*, (1867) 2 Ch. A. 427 (430); and *Migotti's Case*, (1867) 4 Eq. 238.

5. *Bombay National Manufacturing Co., v. Ahmed Bin.* 14 B. 196.

6. *London & Provincial Consolidated Coal Co.*, (1877) 5 Ch. D. 525.

7. *Alexandra v. Automatic Telephone Co.*, (1902) Ch. 63.

8. *Synemodelux Ltd. v. Vannamuttu Pillai*, (1939) 9 Com. Cas. 126.

be an express allotment of shares to him. He cannot repudiate his liability on the ground of misrepresentation.⁹ Besides, he must take the shares direct from the company unless all the shares have already been taken up and cannot in satisfaction of this obligation take a transfer of fully paid-up shares from another member.¹⁰

Membership by application :—This class of shareholder has been referred to in sub-section 2 of Section 30 aforesaid, which contemplates an agreement to become a member of the company and entry on the Register of Members. Thus it is not the agreement alone that would create the status of membership but the share-holder's name should be entered on the Register of Members before such status can be acquired.¹¹ In the last-mentioned case a person had agreed to take shares which had been allotted to him but somehow his name was not entered in the Register of Members. It was sought to place him on the list of contributories on the ground that he was a member some years after, on the company being wound up. It was held that he had never actually become a member.

To constitute an agreement there must be an application by the intending shareholder and allotment by the director of the company of the share applied for, followed by a communication to the applicant of the fact of such allotment having been made.¹² A shareholder to whom the fact that the allotment of shares has been made is not communicated is not bound by the agreement.¹³ Such a person can at any time, before the rights of creditors have intervened on winding up, have his name removed from the Register of Members.¹⁴

The applicant for shares in a company has, as in the case of an ordinary contract, a right to revoke his offer before the notice of allotment is put in course of transmission to him by post.¹⁵ The application of shares is an offer by the applicant and may, therefore, be withdrawn like any other offer, before acceptance is posted.¹⁶ If the applicant revokes his offer before its acceptance, S. 6(1) of the Contract Act applies. Even if he does not revoke, S. 6(2) of the aforesaid Act applies, unless the proposer's conduct amounts to a waiver of the revocation which would follow on the lapse of a reasonable time.¹⁷ The application is generally in writing but may be made verbally.¹⁸ Withdrawal may also be made verbally or in writing.¹⁹ Again an application may be made by an agent duly authorised by the applicant in that behalf²⁰ and may likewise be made to an agent of a company duly authorized to receive such application²¹.

9. *Metal Constituent's Co.*, (1902) 1 Ch. 707.

10. *Mackley's Case*, (1875) 1 Ch. D. 247.

11. *Nicol's Case* (1885) 29 Ch. D. 421.

12. *In re : Scottish Petroleum Co.*, (1883) 23 Ch. D. 413.

13. *Bellary Electric Supply Co., v Kannirani*, 56 Madras 391.

14. *Oakes v. Tarquand*, (1867) 2 H. L. 325.

15. *MacLagan's Case*, (1882) 51 L. J. Ch. 841.

16. *Hebb's Case, National Saving Bank Assn.*, *In re* : (1867) 4 Eq. 9.

17. *Ramlal v. Malak* (1939) 9 Com. Cas 201.

18. *In re : Olympic Fire Etc. Co.*, (1920) 1 Ch. 582.

19. *Treeman's case* (1894) 3 Ch. 272.

20. *In re : Hannan's Express Co.*, (1896) 2 Ch. 643.

21. *Motilal v. Thakorilal*, 86 Bom 557.

Allotment:—Allotment, unless otherwise provided by the articles must be made by a duly constituted Board of Directors at a regular meeting of the Board²², but an allotment by Board irregularly constituted may be subsequently ratified by a regular Board within a reasonable time and before the applicant repudiates the shares allotted on the ground of invalidity²³. Again an allotment must be unconditional,²⁴ and if conditional it must be made on the basis of the condition specified in the application.²⁵ Where, however, the application for shares is conditional and known to be conditional at the time it reaches the directors, they are not at liberty to allot unconditionally so as to make a binding agreement by which the applicant becomes the member of the company.²⁶ If an application for shares is subject to a condition precedent, the applicant incurs no liability if the condition remains unfulfilled and its performance has not been waived.²⁷

Membership by transfer:—A person taking a transfer of shares becomes, subject to Articles of Association, of a company, entitled to be registered as a transferee and placed on the Register of Members in place of his transferor. The subject of the transfer will be discussed later on in detail.

Membership by succession or by estoppel:—Membership by succession to the shares of a deceased or bankrupt member is an incident of law and is usually provided for in the articles of a company. Lastly if a person elects to remain on the Register of Members even where his name has been improperly entered thereon, he may be deemed to be a member of the company on the principles of acquiescence and in such a case he may be estopped from denying that he is registered with his consent. Accordingly, where at the commencement of the winding up, a person is, with his full assent and knowledge, entered on the register of members, as a holder of certain shares, it is too late for him to apply for the removal of his name from the list of contributories even if the contract to take shares in the company may be void or voidable²⁸.

Who may be members?:—As membership contemplates an agreement to become a member and in India an infant or a minor is under a disability and cannot enter into a contract²⁹ an infant cannot, therefore, become a member unless he becomes entitled to shares by operation of law, *e. g.*, by inheritance.³⁰ The Articles of Association of a company usually provide that a minor or an infant cannot be a transferee of shares of the company. On the same principle a lunatic cannot be a member of the company. A corporation being a juristic person and competent to enter into an agreement can become a member, if it is authorized to hold shares in a company under its constitution³¹.

22. *In re: Homer's District Consolidated Gold Mines* (1888) 39 Ch. D. 546.

23. *In re: Portuguese Unconsolidated Copper Mines*, (1889) 42 Ch. D. 160.

24. *In re: Leeds Banking Co. & Addinell's Case*, (1865) 1 Eq. 225.

25. *In re: Universal Banking Co. Roger's Case*, (1868) 3 Ch. D. 683.

26. 52 Bom. 595.

27. 54 P. R. 1915; & *Shanti Parlash vs. Harnam Das*, A. I. R. 1938 Lah. 234. See also *Mahendra Gopal v. Lachman Prasad*, 35 AM. 538.

28. 35 B. L. R. 812; See also *Garland Petroleum Co.*, (1939) 9 Com. Cas. 190 (Mad).

29. *Mohoori Bibi v. Dhurmodasz Ghose*, 30 I. A. 114.

30. *Indian Companies Act by Circar & Sen*, page 88.

31. *Bath's Case*, (1878) 8 Ch. D. 334.

It is, however, doubtful if a firm can be a member as it has, as such, no existence in law. If, however, the name of the firm is, by an oversight, entered in the Register of Members, its partners are deemed to become members of the company.³² On the same principles, a trust cannot become a member though the shares may be registered in the name of the trustees in whom the property of the Trust vests.

Purchase of shares in minor's name :—In a recent Division Bench case of the Lahore High Court,³³ it has been held that where a person purchases shares with his own money by applying in the name of a minor, he must be treated as the owner of the shares, for in such a case the transaction is *benami* and the property in what is bought, is in the person whose money was used for the transaction. Young, C. J., who delivered the judgement in the aforesaid case, relied on an English decision³⁴ in support of his judgement on the point. In that case Sharman not being allowed to take more shares in the company, applied for shares in his daughter's name. His daughter was a married woman and at the date of the transaction was under a disability as she could not, before the Married Women's Property Act of 1881, acquire property without the consent of her husband. The learned Vice-Chancellor in deciding this case remarked as follows :

"It is very remarkable that the point has not arisen before, whether a man is liable to be treated as the owner of the shares by applying for them in a false or fictitious name ; for, I must treat this as a false or fictitious name. I must attribute to Mr. Sharman the knowledge that his daughter being a married woman was incapable of contracting....."

"I think, on general principles, that Mr. Sharman by applying for shares in the fictitious name of his daughter, is as liable to take the shares as if he had taken them in his own name. I call Mrs. Pugh's name fictitious, because Mr. Sharman knew perfectly well that she could not bind herself. If he had applied in the name of a person capable of contracting, the case would be different."

In the last, mentioned decision³⁵ it was simply a case where the transferee whom they sought to put upon the Register had actually signed the transfer but had signed it in the name of another who had given him no authority to do it, namely as infant. Therefore they treated him as the real person who had signed the contract and consented to go on the register in respect of the shares."

In a recent Madras Case³⁶ however, the aforesaid Division Bench case of the Lahore High Court has been sought to be distinguished on the grounds that it was not clear in the Lahore case as to whether the fact of minority was disclosed at the time of application. In this case application for shares was made by the father of a minor girl as her guardian and the company issued shares to and registered shares in the name of the minor, describing her as a minor. It was held that the contract was made by both sides.

32. *Weiskersheim's Case*, (1873) 8 Ch. A. 331.

33. *Muslim Bank of India Ltd.* in liquidation in re . A. I. 14. 1939 Lahore 515.

34. *Pugh and Sharman's Case*, (1872) 13 Eq. 566.

35. *Imperial Mercantile Credit Association*, In Re 1875 Eq. 588.

36. *Palaniappa Mudaliar v. Official Liquidator, Pashupathi Bank*, (1942) 12 Com. Cas. 89.

under complete misapprehension as to the law, but no misapprehension whatever as to the facts and under the law it was void. It was also held that as there was nothing on the record to show that the father had at any time intended to become a subscriber of the company, he could not be deemed to have contracted under an alias and was therefore not liable as a contributory.

Issue of shares at a discount:—The issue of shares at a discount was always held to be void on the principle that any arrangement by which the liability of a shareholder to pay the nominal amount of the share acquired by him in a company is excused to any extent is invalid.³⁷ Section 105-A of the Indian Companies Act recently added by the amending Act of 1936, however, now validates the issue of shares at a discount. According to the last-mentioned section, it is lawful for a company to issue its shares of a class already issued at discount provided that such issue is authorised by resolution passed in general meeting of the company and is sanctioned by the Court. The resolution aforesaid must specify the maximum rate of discount (not exceeding 10% in any case) at which shares are to be issued. Further, such shares cannot be issued at least for a year since the date on which the company was entitled to commence business, though they must be issued within 6 months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

The particulars of the discount allowed on the issue of such shares or so much of the discount as has not been written off, must be stated in every prospectus and balance sheet issued subsequently to the issue of such shares. In case of a default the company and every officer of the company who is in default is liable to a fine not exceeding fifty rupees. The Section aforesaid has now made it possible for the companies to issue shares at discount on certain specific conditions enumerated above. The company cannot issue its shares at discount till after the lapse of one year from the commencement of its business, the idea being to allow it full one year for making efforts to dispose of its share at their nominal value without any discount.

Commission or brokerage on shares:—Section 105 of the Act makes it lawful for a company to pay commission to any person in consideration of his subscribing or agreeing to subscribe for any shares in the company or procuring or agreeing to procure subscription for any shares therein, provided the payment of such commission is authorised by the Articles and the commission paid or agreed to be paid does not exceed the amount or rate so authorised and if the amount or rate per cent of the commission paid or agreed to be paid is disclosed in the prospectus, or statement in lieu of prospectus, as the case may be. Thus though shares cannot, as a rule, be issued at a discount, except as provided by Section 105-A, commission on shares was permissible even prior to the insertion of Section 105-A by the Amending Act of 1936. The condition precedent to any commission being paid is, of course, an authority to do so if given by the Articles of Association. It is not, however, sufficient if such authority is given by the Memorandum only.³⁸ The commission, however, cannot be allowed to a subscriber of shares and any attempt in doing so may be restrained.³⁹

37. *Welton v. Sasserly*, (1897) A. C. 299; *Almada and Trito Co.*, 88 Ch. D. 415; *Target Gold Mining Co. v. New Belkie's Earsteling Ltd.*, (1903) 1 K. B. 461.

38. *Republic of Bolivia Syndicate*, (1914) 1 Ch. 139.

39. *Keating v. Paranga Mines Ltd.*, (1902) W. N. 15.

The word 'Agreeing to subscribe' in the Section 105 aforesaid obviously refers to underwriters who agree to purchase certain proportion of shares in case they are not subscribed by the public within a specified time. In return of their services and agreement, they are allowed the commission. The usual procedure in such a case is to write a letter agreeing to take up the shares that may be left undisposed of after a certain date. The underwriting letter usually authorises the person to whom it is addressed to apply in the name of the underwriter, should he fail to do so when called upon.⁴⁰ Such an authority is said to be an "authority coupled with an interest" and after acceptance by the promoter, is irrevocable.⁴¹

The position of underwriters has been discussed by the Judicial Committee in *Australia Investment Trust Ltd. v. Strand & Pitt Street Properties Ltd.*,⁴² as follows:—

"The obligation in fact is and remains nothing more or less than an obligation to subscribe for shares in the company. It is true that it is an obligation to subscribe for shares only on the happening of a contingent event, the number, if any, of the shares to be taken up, depending on the magnitude of the event, but this is an obligation of the same nature as an obligation to subscribe for a definite number of shares *in praesenti* though of more uncertain burden until it is crystallized by the happening of the contingency. In both the cases the commission is agreed to be paid to induce the same thing, namely, the undertaking of the obligation to subscribe. No other service than undertaking this obligation is in either case rendered by the receiving of the commission. In both the cases he in fact receives from the company a discount or rebate upon the amount payable upon the shares which he has to take up. It cannot make any difference that under the underwriting agreement he may not, in the event, have to take up any shares and may yet get his commission all the same."

Allotment of fully or partly paid-up shares otherwise than in cash:—An exception to the rules that the shares must be paid in cash is that a company may allot fully or partly paid-up shares to the promoters and other persons for services rendered or as consideration for a business or other property sold to the company. In such a case the company must file with the Registrar within one month from the issue of such shares, contract in writing showing the title of the shareholder and the consideration in respect of which the shares were allotted to him as such. (Section 104 (1) (b). It is, however, beyond the power of a limited company to release a shareholder from his obligation without payment in money or money's worth. It cannot give fully paid-up shares for nothing and preclude itself from requiring payment in money or money's worth.⁴³ Consequently if there be any fraud or the consideration is found to be inadequate or wanting the person to whom fully or partly paid-up shares are allotted, will be held liable notwithstanding the filing of the contract with the Registrar.⁴⁴ See however *Mosley v. Koffyfontein Minings Ltd.*,⁴⁵ wherein it has been held that in the absence of fraud the Court will not go into the question of adequacy or otherwise of the consideration.

40. *Ex. Audam*, (1889) 12 Ch. D. 1.

41. *Carmichael's Case* (1896) 2 Ch. 643.

42. (1932) A. C. 785 (747).

43. *Addystone Marine Insurance Co.*, (1899) 3 Ch. 9.

44. *Hongkong & China Gas Co. v. Glen*, (1914) 1 Ch. 527.

45. (1904) 2 Ch. 796.

Share certificate—Right of any shareholder to Certificate :—Under the law, every shareholder is entitled to get a certificate issued to him as evidence of his title to the shares acquired by him.⁴⁶ This is to give him his opportunity of more easily dealing with his shares in the market and to afford facilities to him of selling those shares by at once showing a marketable title.⁴⁷

Section 103 requires, however, a company, unless the conditions of issue of the shares, debentures or debenture-stock, as the case may be, otherwise provide to complete and have ready for delivery the certificates of all shares, the debentures and the certificates of all debentures-stock allotted or transferred within 3 months after the allotment or after the registration of the transfer, as the case may be. If default is made in complying with the requirement aforesaid, a party to the default is liable to a fine not exceeding fifty rupees for every day during which the default continues.

Certificate is *prima facie* evidence of title :—The certificate under the Common Seal of the company is a *prima facie* evidence of the title of the members to the shares therein specified (S. 29) though it does not give the person an absolute or an indefeasible right to the shares. Accordingly if it may be shown that the shares were acquired by the holder from some person who could not give the title to them, the name of the true owner will be retained upon or restored to the Register of Members.

Estoppel b Company :—If, however, the holder acquires the shares in good faith and for value on the faith of and in exchange for a certificate issued by the company the company will be estopped from denying his title to the shares which he was induced to buy or pay for by being shown in the certificate.⁴⁸ The holder in such a case can, however, only claim damages against the company and is not entitled to the shares as against the true owner.⁴⁹

Where it is stated in the certificate that the shares are fully paid up, or partly paid up, and a person, acting on the faith thereof purchases the same, the company or its liquidator is estopped from alleging the contrary,⁵⁰ though a person who knew that such shares were not fully paid up, cannot take advantage of the statement in the certificate.⁵¹ The onus in such a case, however, would be on the liquidator to show that the party sought to be made liable had notice that they were not so paid up.⁵² There is however, no estoppel if the certificate is a forgery.⁵³ The company comes under no liability in such a case even though the forgery was the act of its secretary⁵⁴ But the company may possibly be estopped by a certificate issued under the authority of its directors, even if such authority was obtained by fraud of the secretary⁵⁵

46. *In re : Societe Generale De Paris v. Walker*, 11 A. C. 20.

47. *In re : Bahia Sanfrancisco Rly Co.*, 18 L. T. 467 (471).

48. *T. Balkis Consolidates Co. v. Tomkinson*, (1893) A. C. 396 (411); *Bahia Sanfrancisco Rly Co.*, (1868) 3 Q. B. 584.

49. *Hart v. Frontino Co.*, (1870) 5 Ex. 111.

50. *Burkinshaw v. Nicolls*, (1878) 3 A. C. 1004; and *Bloomenthal v. Ford* (1897) A. C. 156.

51. *African Gold Concessions etc. Co.*, (1899) 1 Ch. 414.

52. *A. W. Hall & Co.*, (1887) 37 Ch. D. 712.

53. *Bulkies Consolidates Co. v. Tomkinson*, (1893) A. C. 396.

54. *Ruben v. Great Fingall Consolidated*, (1904) 2 K. B. 712; (1906) A. C. 439.

55. *Dizon v. Kennaway*, (1900) 1 Ch. 833.

Right of a share-holder to more than one certificate :—Generally a share-holder is entitled to one certificate, free of charge, and upon payment of a small fee and the execution of an indemnity bond, such a certificate may be replaced, if it is defaced, lost or destroyed. But the articles may provide for the issue of more than one share-certificate. In a recent case⁵⁶ the trustees of a will holding 230 shares in a company had, on previous occasions, several times requested that the share-certificate should be altered to different amounts, each amount represented by a separate certificate. The request had been complied with on four such occasions. On the fifth occasion, the directors objected to it and refused to alter the sub-division. It was provided by one of the articles (No. 12) that every member should be entitled to one certificate for all the shares registered in his name, or to several certificates, each for a part of such shares, while another article (No. 14) *inter alia* provided that for every subsequent certificate issued, a sum of 1 S or such smaller sum as the directors may determine, should be paid to the company. It was held that, under the circumstances, the trustees were entitled as shareholders to demand certificates for the sub-divided amount. The argument of Mr. Grant, the counsel for the company in the aforesaid case to the effect that "assuming that there is a right in the member to call from time to time for his certificate to be split, that is a right which he is only entitled to exercise to a reasonable extent" was repelled by Mr. Wilfrid Green, M.R. who observed :—

"This is an argument which I am unable to accept. It would involve reading into Art. 12, by implication, a proviso to that effect. On no canon of construction is it possible, in my judgment, to read in such a proviso, and I decline to do so."

Allotment when and how to be made :—The following provisions of S. 101 relating to the conditions precedent for making allotment etc., are to be carefully noted :—(1) Allotment can only be made of any share capital of a company offered for public subscription if (a) the amount stated in the prospectus as the minimum amount which in the opinion of Directors must be raised by the issue of share capital in order to provide for sums in respect of matters specified below has been subscribed ; (b) and the sum of at least 5% thereof has been paid to or received in cash by the company.

(2) The matters referred to above are as follows :—

- (a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue ;
- (b) Any preliminary expenses payable by the company and any commission so payable to any person in consideration of his agreeing to subscribe for or of his procuring or agreeing to procure subscriptions for any shares in the company ;
- (c) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters ; and
- (d) Working capital.

(3) The amounts referred to above as the amounts stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is referred to in the Act as the minimum subscription.

⁵⁶. *Sharpe v. Topham Ltd.*, (1989) 1 All. E. R. 123 (Ch. D.).

- (4) All moneys received from applicants for shares shall be deposited and kept in scheduled Bank as defined in Reserve Bank of India Act, 1934, until the certificate to commence business is obtained or until it is returned as given below :—
- (5) Contravention of the above provisions mentioned in (1) to (4) above would make promoter, director or other person knowingly responsible for such contravention liable to a fine not exceeding Rs. 500.
- (6) The amount payable on application on each share shall not be less than 5% of the nominal amount of the share.
- (7) If the conditions aforesaid as mentioned in (1) to (4) and (6) are not complied with within 180 days from the first issue of the prospectus, all moneys received from applicants for shares must be returned to them without interest. If such money is not so returned the Directors of the company shall be jointly and severally liable to repay that money at 7% p. a. interest calculated from the expiration of 190th day, but if a Director proves that the loss of money is not due to any misconduct or negligence on his part, he shall not be liable.
- (8) Any conditions requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void. The provisions above mentioned (except the one mentioned in (6) above) shall not apply to a second or subsequent allotment of shares offered to the public for subscription.
- (9) Except in the case of a private company or of a company which has allotted any shares or debentures before the commencement of this Act (7 of 1913), in the case of first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless :—
 - (a) the minimum subscription that is to say the amount if any, fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or if no amount is so fixed and named, the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash, has been subscribed.
 - (b) and the amount not less than 5% of the nominal amount of each share payable in cash has been paid to and received by the company.

Allotment and effect of irregular allotment:—Allotment should always, however, be made within a reasonable time or else it would not be binding.⁵⁷ Again, an allotment once made and communicated cannot be cancelled.⁵⁸

Provided that, in case of default in filing with the Registrar within one month after the allotment any document required to be filed by this section, the company or any person liable for the default may apply to the court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that on other grounds it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such a period as the Court may think proper. The above provision shall not, however, apply to the issue of an allotment by a company of shares which under the provision of its articles were forfeited for non-payment of calls.

57. *Indian Cooperative Navigation Co. v. Padamasy*, A.I.R.1934 B. 97 & 161 I.C. 294 (Lahore).

58. *Duff's Executors' Case*, (1896) 32 Ch. D. 301.

(*Vide* Section 104). There is nothing in the provisions of Section 104 aforesaid which requires that a duty payable on conveyance should be levied on the agreement for allotment of shares of a company in future. If, after entering into contract for sale, the parties thereto, in spite of the risk that either party may resile from the contract, refrain from getting an actual deed of conveyance prepared, they can successfully evade the payment of higher duty.⁵⁹ Again it has been recently held by the Calcutta High Court that there is nothing in Section 101 of the Act which forbids the directors of a company to allot shares to applicants who neglect to pay the application money in terms of the prospectus once the first allotment has been regularly made, although it may be that a provision in a prospectus empowering them to do this would be an infringement of the Act.⁶⁰ In the last-mentioned Calcutta case, the view of the Lahore High Court in *Mutual Bank of India v. Sohansingh*⁶¹ to the contrary has been expressly dissented from. It was held in that case by the Lahore High Court that any allotment (whether first or the subsequent) which is made without payment of at least 5% of the nominal value of the shares by the applicant is invalid in view of Sub-section (3) read with sub Sec. (6) of Section 101. No substantial reason, it is submitted, has been given in the Calcutta case aforesaid for disagreeing with the Lahore view on the point. The Lahore view has also been followed by the Nagpur High Court.⁶²

Penalty for non-compliance with the provisions above mentioned :—If there is any contravention of above provisions in allotment made by the company, such allotment shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and if the company is not required to hold statutory meeting or allotment is made after the statutory meeting, within one month after the date of first allotment, it shall be so voidable and notwithstanding that the company is in the course of being wound up (Sec. 102). It may, however, be noted in this connection that the applicant wishing to avoid the contract need not take actual legal proceedings within one month. Notice of avoidance must, however, be given within one month, followed by prompt legal proceedings which may be filed even after the month.⁶³ Again irregular allotment is only voidable at the option of the shareholder concerned and if the shareholder, nevertheless, prefers to keep the shares, the company cannot insist on paying back the application money⁶⁴. A person paying the allotment money and subsequently acting as a shareholder without objection cannot challenge the validity of allotment. He will be taken to have agreed to take the shares or at any rate he will be estopped from denying that he has so agreed.⁶⁵

Besides, if any director of a company knowingly contravenes or permits or authorises the contravention of any of the above provisions with respect to allotment he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby. The proceedings to recover any such loss, damage or costs shall not, however, be commenced after the expiration of 4 years from the date of the allotment. (*Vide* Section 102).

59. *The Incorporation of Swadeshi Cotton Mills & Co.*, In re : A. I. R. 1932 All. 201 ; 1932 A. L. J. 394.

60. *Happy India Insurance Co. Ltd.*, In re : (1940) 10 Com. Cas. 83 (86).

61. A. I. R. 1936 Lahore 790 : 161 I. C. 952.

62. *Ram Lalso Gupta M. F. R. Malah*, (1938) 9 Com. Cas. 201.

63. *National Motor etc.*, (1908) 2 Ch. 228.

64. *Burton v. Bevon*, (1908) 2, 240 Ch.

65. 28 I. C. 58

Return as to allotment:—When a company having a share capital makes any allotment of its shares, it shall within one month thereafter do the following things :—

- (a) file with the Registrar a return of the allotment (in Form XV given in the appendix B) stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees, and the amount (if any) paid or due and payable on each shares; and
- (b) in the case of shares allotted as fully or partly paid up otherwise than in cash, produce for the inspection and examination of the Registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped and filed with the Registrar copies verified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

Where such a contract as above mentioned is not reduced to writing, the company shall within one month after the allotment, file with the Registrar the prescribed particulars of the contract (Form XVI in Appendix B) stamped with the same stamp-duty as would have been payable if the contract had been reduced to writing, and these particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1899, and the Registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section 31 of that Act.

If default is made in complying with the above requirements every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues.

THE REGISTER OF MEMBERS

Contents of register of members :—Every company is required to keep in one or more books a Register of its members and enter therein the following particulars :—

- (i) The names and addresses, and the occupations, if any, of the members and, in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed so to be considered as paid on the shares of each Member;
- (ii) The date at which each person was entered in the Register as a Member.
- (iii) The date at which any person ceased to be a member.

If the company makes default in complying with the above requirements, it shall be liable to fine not exceeding Rs 50 for every day during which the default continues. Besides, every officer of the company who knowingly and wilfully authorises or permits the default, shall be liable to the penalty aforesaid. (*Vide* Section 31).

Index of members.—When the company has more than 50 members, it must, unless the Register of Members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company, which must be corrected within

14 days of any alteration in the registers. The index must contain a sufficient indication to enable the amount of any member in the Register to be readily found. It may be in the form of a card index. If default is made in complying with the above provisions, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding Rs. 50 *Vide* S. 31-A,

In the case of joint holders of shares, it is their right to determine the order in which their name should be entered and such order may effect the right of attending meetings and voting thereat in a case where articles declare that only the first name shall have this right.⁶⁶ In the last-mentioned case Warrington, J., made the following observation :—

“It seems to me that the joint holders of shares are entitled to arrange among themselves which of them shall stand first on the Register of Members and exercise on behalf of all the rights of voting which belong to them collectively.”

Accordingly where two trustees held a large block of shares and required their names to be entered as to some of such shares in one order and as to others of such shares in the reverse order but the company failed to comply with their requests in this respect, it was held that they were within their rights to make the demand aforesaid. The Court ordered the rectification of the Register pointing out that the names of joint holders are to be so recorded as not to prevent a fair and reasonable exercise by the members of the rights of dominion in their own property consistent with the constitution of the company of which they are the principal corporators.⁶⁷

Entries which ought not be made on the Register :— Trusts should not be entered in the Register of Members. Section 33 provides that no notice of any Trust, expressed, implied or constructive shall be entered on the Register or be receivable by the Registrar. The Section embodies the well recognised principle that companies have no concern with the relation between trustees and their *cestui que trust* in respect of their shares. So if a trustee is on company's register as the holder of shares the relation which he may have with some other person in respect of shares is a matter of which the company can take no notice. So far as company is concerned, it can only look to the man whose name is on the Register even if it has knowledge that the member is a trustee.⁶⁸ The company is thus relieved of the duty of making enquiries as to any trust and from all responsibility for registering a transfer which may be bad for the reason of any breach of trust.⁶⁹ Though a company is not bound to recognise a trust in respect of its shares, yet that would not prevent a court from considering the rights between the parties and the propriety of dealings made by the company after notice of the trust given by the beneficiary. There is nothing to prevent a court from recognising a trust in a suit in which evidence of the trust is forthcoming.⁷⁰ A company is thus liable to be affected with notice of any equitable interest which a third party indicates to it.⁷¹ Accordingly,

66. *T. H. Saunders & Co.*, 1908 1 Ch. 415.

67. *Burn v. Siemen Bros. Dynamo Works*, (1919) 1 Ch. 225.

68. *In re : Perkin*, 24 Q. B. D. 611 ; & *Chapman and Banker's Case*, 3 Eq. 361

69. *Simpson's v. Molson's Bank*, (1895) A. C. 270.

70. *Dharwar Bank Ltd. v. Md. Hayat*, A. I. R. 1931 Bom 269 : 133 (C 241)

71. *Ramford v. James Keith & Blackman Co Ltd*, (1905) A. C. 270.

if a company in face of such notice that the shareholder is not the beneficial owner of the shares, makes advances or gives credit to the latter, is not protected by Section 33 or by the provision to that effect in the articles of association and consequently cannot assert against the beneficiaries a lien on the shares for the indebtedness of the member.⁷²

If a person holds shares in a company as a Trustee then as between himself and the company he is a shareholder and as such personally liable for all payments and obligations though he may be entitled to indemnity from *cestui que trust*.⁷³

Again a company must not enter in the Register of Members that it has a lien on the shares of a member ⁷⁴. Nor can it insist on putting in the Register anything except what is required by the Act to be inserted therein.⁷⁵

Unimportant omissions immaterial :—A register of members which substantially contains the information required by the Act is not invalidated by unimportant omissions and deviations.⁷⁶ Accordingly where the denoting members of all the shares are not given separately but only the first and the last are mentioned without the intermediate ones it may reasonably be inferred that the numbers omitted were which were intermediate between the numbers given ⁷⁷

Right of executor to have his name entered on the Register of Members :—Where an executor has the legal right to the shares of which the deceased testator was the registered holder, he is, in the absence of any power of veto conferred on the company by its articles of association entitled to have his name entered on the Register if he so desires as ancillary to his legal right to the shares in question.⁷⁸ Where such a person is registered as a shareholder in his representative capacity as an executor and later on becomes entitled to the shares as owner, on division of the estate of the deceased, the company is bound to register him as owner of the shares, without the formality of the execution of transfer to him, which will be an idle formality in such a case.⁷⁹

EFFECT OF ENTRY ON THE REGISTER

Prima facie evidence afforded by the Register :—Register of Members is *prima facie* evidence in respect of the matters which are directed by the Act to be contained or inserted therein (S. 40). Accordingly if a name of a person is borne on the Register of Members, it affords a *prima facie* evidence of the fact that he is a member of the company and burden of proving the contrary rests on the person who alleges it.⁸⁰ The

72. *Mackreth v Wigan Coal & Iron Co.* (1916) 2 Ch. 293.

73. *Ex-parte Pugg*, 12 L. T. 696 and *Hughes Hallet v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561.

74. *Key (W) & Sons Co. Ltd*, In re : (1902) 1 Ch. 467.

75. *Samder's (Th) & Co.*, (1908) 1 Ch. 415.

76. *Alliance Financial Corporation*, In re : 3 B. H. C. R. 106.

77. *Ibid.*

78. *Scott v. Frank F. Scott (London) Ltd.*, (1941) 11 Com. Cas. 127 (137).

79. *Edwards v. Ransome & Rapier.* (1930) 143 L.T. 594.

80. *Waryam Singh v Official Liquidator*, A. I. R. 1926 Lahore 414, *Bakhshish v. Khalsa Bank*, A. I. R. 1933 Lahore 1016; & *Marwari Stores vs. Gouri Shanker Goenka* A. I. R. 1936 Calcutta 327 and *Ramdas v. Official Liquidator*, 9 All. 366.

Register of Members being merely a *prima facie* evidence is, however, not conclusive and it may, even in proceeding for rectification of the Registers, be proved that the entries therein are incorrect.⁸¹ So, if a person, who is benefited by the *prima facie* evidence afforded by the Register, does not stand upon such evidence until it is rebutted by the opposite party, but goes further and produces other evidence in support of the statements in the Register, he does so at his own risk, for the evidence so produced may throw discredit on the Register and displace the presumption which the Register affords, even though the defendant does not produce any evidence.⁸²

Estoppel by entries in the Register.—Again, entries in register may estop company or shareholders as the case may be. A person who obtains a transfer of shares is, unless he has notice to the contrary, entitled to assume the correctness of the entries in the register as to the amount paid up on the shares purchased by him and cannot be made liable for such amount, though as a matter of fact it has not been paid.⁸³ Likewise when a person has been treated as a shareholder and acted as such, he cannot deny his position to protect himself from liability arising therefrom.⁸⁴

INSPECTION OF REGISTER.

Right of Inspection and take extracts and copies of members and outsiders.—The Register of Members commencing from the date of registration of the company and the index of members must be kept at the company's registered office and be open during business hours in each day to the inspection of any member gratis and to the inspection of any other person on payment of Re. 1/- or such less sum which the company may prescribe for such inspection, except when the Register is closed under the provisions of Section 37 of the Act. The company may, however, in general meeting, impose reasonable restrictions as to the number of hours for which the Register of Members be open for the inspection, provided not less than 2 hours in each day are allowed for such inspection. Any such member or other person may make extracts therefrom and may also require a copy of the register or of any part thereof on payment of 6 annas for every 100 words or fractional part thereof required to be copied and the copy so required must be sent to such person within a period of 10 days, exclusive however of non-working days and days on which the transfer books of the company are closed commencing on the date next after the day on which the requirement is received by the company. Any company failing to supply such copy within the period mentioned above or to submit its registers for inspection, is liable to a fine not exceeding Rs. 20/- and to a further fine not exceeding Rs. 20/- for every day during which the refusal or default continues. The Court is also empowered to compel an immediate inspection of the Registers and index or to direct that copies required shall be sent to the person requiring them (Section 36). Thus the aforesaid provision provides for the inspection of the Register of Members, by the members themselves, as also by outsiders with the only difference that the former are entitled to inspect it free of charge while the latter are liable to pay to the company a sum not exceeding rupee one as the company may prescribe for each inspection. The provision is meant not only for the protection of the shareholders but also for the

81. *Briton Medical Association & General Life Assurance*, 29 Ch. 61.

82. *Ramdas vs. Official Liquidator*, 9 All 866.

83. *Nicol's case*, 7 Ch. D. 533; & *Spargo's case* 8 Ch. 407.

84. A. I. R. 1936 Lahore 226.

protection of public and even a temporary refusal based upon grounds of convenience to the company's business would be tantamount to a default within the meaning of Section 36 aforesaid and would render the director responsible for such refusal liable to penalty provided by the Section.⁸⁵ A person who applies for inspection need not state his object.⁸⁶

Right of inspection etc., when ceases :—The provisions aforesaid apply to a company only so long as it is a growing concern and the right to inspect and require copies consequently ceases when the company is in liquidation.⁸⁷ If, after the commencement of winding up by or subject to supervision of Court, inspection is required and the order of the Court must be obtained and the court can permit inspection only to the creditors and contributories of the company. In such a case the inspection can be made only in conformity with the order of the Court.⁸⁸

Changes introduced by the Amending Act of 1936 :—The right to take extracts from the Register has been expressly conferred by the Amending Act of 1936 and has done away with the divergence of judicial decision on the point. Similarly, the provision fixing the limit within which a required copy has got to be supplied to the person requiring it, has been fixed by the Amending Act, 1936 in order to provide against an inordinate delay in supplying the copy. The limit of 10 days, however, is exclusive of the non-working days and the days on which the transfer books of the company are closed and also excludes the day on which the requisition for the copy is received by the company.

The period during which the Register may be closed :—A Company may close the Register of members for a period not exceeding in the whole 45 days in each year but not exceeding however, 30 days at a time, upon giving 7 days' previous notice thereof by advertisements in some newspaper circulating in the District in which the Registered office of the company is situate. (Section 37).

Reason for the rule :—The provisions as to 7 days' previous notice, and as to the aggregate period of 45 days and that the Register cannot be kept closed for more than 30 days at a time, were introduced by the Amending Act, 1936. The time during which the Register of Members may be closed has been extended to 45 days to make more generous allowance for those cases in which it is closed at two separate times during the year. (Report of the Select Committee.)

RECTIFICATION OF REGISTER OF MEMBERS

Provisions of S. 38 as to rectification of the Register :—Section 38 of the Act provides that if the name of any person is fraudulently or without sufficient cause entered in or omitted from the Register of Members of any company, or if default is made or unnecessary delay takes place in entering on the Register of the fact of any person having ceased to be a member of the company, the person aggrieved or any member of the company or the company itself, may apply to the Court for the rectification of the Register and payment by the company of any damages sustained by any party aggrieved.

85. 20 All. 126.

86. *Holland v. Dickson*, 37 Ch. D. 689 and *Davis v. Gas Light Co.*, (1909) 1 Ch. 248.

87. *Kent Coal Fields Syndicate*, (1898) 1 Q. B. D. 754.

88. *Somerset v. Land Securities Co.*, (1897) W. N. 29.

The Court may also make such order as to costs as it may, in its discretion, think fit. Section 38 (1).

Damages and measure thereof:—If, however, the order for rectification is refused, the Court cannot give damages upon a motion under the aforesaid provisions, the proper course in such a case is for the person aggrieved to bring an action.⁸⁹ The amount of damages recoverable in an action against directors for false representation contained in a prospectus, is the difference between the price paid by the plaintiff and the value of the shares on the date of allotment⁹⁰ and where an allottee obtains against the Company an order for rectification in respect of shares, upon which payments have been made by him to the company, measure of damages has been held to be, the amount paid upon the shares, together with interest thereon.⁹¹

Question of title:—The Court has also been empowered to determine any question relating to the title of any party to the application whether the question arises between members or alleged members on the one hand, and the company on the other. It may also generally decide any question necessary or expedient to be decided for rectification of the Register. (Sub.-sec. 3 of Section 38.) The Court instead of deciding the question referred to above itself, may direct an issue to be tried in which any question of law may be raised. In the last-mentioned case an appeal from the decision of such an issue shall lie in the manner directed by the Civil Procedure Code and on the grounds mentioned in Section 100 of that Code.

Jurisdiction of Court under S. 38:—The jurisdiction of the court under this section is unlimited⁹² and is not limited to cases mentioned in the section aforesaid.⁹³ But the power of rectifying the Register given by the Section aforesaid is purely discretionary. The Court may decline to exercise this power, if it is not fair to do so, that is to say if the applicant has not established any equity to disturb the existing state of things.⁹⁴ Thus the power to order rectification of a register of a company is entirely a matter of discretion for the Court and it ought not to be exercised when the only effect of the application is to save the expenses of taking out letters of administration and of a legal transfer of the shares to the applicant's name.⁹⁵ Similarly, the court will not order the transfer to be registered where the alleged transferor is not before the Court and there is any real doubt as to the validity or benefits of the transaction⁹⁶. Again, the Court is not bound to decide under its summary jurisdiction a serious question of title⁹⁷. Where, however, there is no such question involved, the Courts, as a rule, never decline to exercise summary jurisdiction under the Section

89. *Otto Copje Diamond Mines*, (1893) 1 Ch. 618

90. *Kaskett v. Kewick*, (1902) 2 Ch. 468.

91. *Railway Time Table Co. etc.*, 42 Ch. D. 98 ; *Addlestone Linocum Co.*, 37 Ch. D. 191; *Karber Case*, (1892) 3 Ch. 1.

92. 47 Calcutta 901.

93. *Burns v. Siemen Bros*, (1919) 1 Ch. 225, *Newzealand Kapanga Gold Mining Co.*, 18 Eq. 17 ; *Darlington Force Co.*, 34 Ch. D. 522 ; *Homer District Consolidated Gold Mines*, 39 Ch. D. 546.

94. *Bellarby v. Roland Etc.*, (1901) 2 Ch. at page 278; *Burn v. Siemen Bros. Dignamo Works* (1919) 1 Ch. 225.

95. 55 I C. 751.

96. 8 Cal. 317.

97. 44 All. 151; A. I. k. 1922 All 258.

referred to above to compel the company to do what really is nothing more than a ministerial act.⁹⁸ In a simple case where immediate rectification is essential, it is desirable to apply under Section 38, but if the case is at all complicated an action should be brought.⁹⁹ So in a conflict of equity between two claimants, the jurisdiction will not be exercised in a complicated and difficult case.¹⁰⁰ It must, however, be submitted in this connection that the insertion of the proviso to sub-section (3) of Section 38 seems to suggest that so far as the Indian Courts are concerned, the power of rectification of the Register is much wider than under the corresponding section of the English Act, as in a difficult case under S. 38 of the Indian Companies Act, the Court may instead of directing the applicant to a regular suit, direct an issue to be tried retaining, however, the application on its own file.

Ordinary Jurisdiction of civil court not ousted :—Summary jurisdiction conferred under this Section does not oust the ordinary jurisdiction of Civil Court in actions properly constituted.¹⁰¹ If, from its complexity or otherwise, the Court thinks that any case could be more satisfactorily dealt with in an action, the Court, without prejudice to the applicant's right to institute an action for rectification, will decline to make an order.¹⁰² Apart from Section 38, a suit may, without any direction by the Court be brought for the rectification of Register.¹⁰³

When, however, the Court entertains the application it is bound to go into all the circumstances of the case and to consider all the equity the applicant has to call for its interposition.¹⁰⁴ So where the Court elects to decide the question it may either decide itself or send it to somebody else in the form of an issue.¹⁰⁵ The proviso to Section 38 must be read as a general reservation imposed on all the clauses, as it is not confined only to the last clause.¹⁰⁶

Persons aggrieved under the meaning of Section 38:—The jurisdiction under Section 38 can be invoked both by the aggrieved person and by the company. (S. 38) So a company has a right to take proceedings as soon as there is a person alleging himself to be aggrieved by an improper entry or omission.¹⁰⁷ The term (person—aggrieved) is wide enough to include the transferee of shares in company whose legal title a company refuses to recognise¹⁰⁸ provided the transferee's title is complete. If, however, it is not complete he has no such right.¹⁰⁹ Thus a transferor and transferee of the shares of

98. *Ex parte Ward*, 3 Ex. 180; *Ex parte Shaw*, 2 Q. B. D. 463.

99. 47 Cal. 901 and A. I. R. 1928 Madras 571.

100. *Stewart's Case*, 1 Ch. 545; *Wardened Henry's case*, 2 Ch. 431.

101. 44 All. 151; 1922 All. 258 and A. I. R. 1928 Lahore, 234.

102. *National and Provincial Marine Insurance Co. in re: Ex parte Parker*, (1867) 2 Ch. A. 685, *Simpson's Case*, (1869) 9 Eq. 91; *Stewart's Case*, (1865) 1 Ch. A. 574, *Askew's Case*, 9 Ch. 324 C. A.

103. *Bloxam v. Metropolitan Cab & Carriage Co.*, (1864) 12 W. R. 736, *Lynde v. Anglo-Italian Hemp Spinning Co.*, (1869) 1 Ch. 178.

104. *Trevor v. Whitworth*, (1887) 12 A. C. 409 (140); *Sichell's Case*, (1867) 3 Ch. A. 119.

105. 44 All. 151 & A. I. R. 1928 Lahore 234.

106. 41 Bom. 76; & 26 Cal 944.

107. *Indo-China Steam Navigation Co., in re:* (1917) 2 Ch. 103.

108. 16 Bom. 398.

109. 16 Bom. 398.

the company can make an application for the rectification of Register. Similarly where the name of a person who is a member of the company is struck out, he is entitled to apply for rectification, for the effect of the same is as if his name had never been entered. The striking out of his name in the Register thus causes his name to be omitted therefrom and accordingly he is a person aggrieved within the meaning of Section 38.¹¹⁰

Necessary parties :—The company should be made a party in an application for rectification of Register though it is not necessary to make the directors parties thereto.¹¹¹ Similarly where a company refuses to register a transfer, it is not necessary to make the directors parties thereto.¹¹² Similarly where a company refuses to register a transfer, it is not necessary for the transferor to join the transferee in his application,¹¹³ but on general principle where the transferee makes the application, it is necessary to make the transferor party thereto.¹¹⁴ In the last-mentioned case Their Lordships of the Privy Council have pointed out that inasmuch as the putting of the transferee's name in the company's Register necessarily involves an order to take the transferee's name off, no rectification can be ordered in an action to which the transferor was not a party.

Other persons affected may intervene :—Again, parties whose rights are affected are entitled to intervene. Accordingly a mortgagee of the uncalled capital of the shares is entitled to oppose an application by a shareholder to have his name removed from the Register of Members, being widely interested in the proceedings and seriously prejudiced by an order of rectification made behind his back.¹¹⁵

Ground for rectification :—The grounds on which jurisdiction under this Section has been exercised in various English cases have been nicely summarised in Palmer's Company Law as follows.—

Illustrative cases :—“ The following are a few illustrative cases in which orders have been made, where the applicant was induced to take shares by misrepresentation (*Stewart's case*, 1 Ch. A. H. 574; and *Humphrey and Denuman v. Cannanagh* (1925) 41 T. L. R. 378 C. A.; *Anderson's case* 17 Ch. D. 373; where the company improperly neglected to register a transfer. *Stranton Iron and Steel Company*; 16 Eq. 59; where shares had been issued to the applicant as paid up without filing a contract in compliance with Section 25 of the Companies Act, 1867. *Newzealand Kapanga & Co.*, 18 Eq. 17; where shares were improperly forfeited (*Yslatysere Gas Co.*, W. N. (1887) 30 where the company acting on forged transfer had removed the name of the applicant, the real owner *Bahia & Co.*, L. R. R. B. 584; where there was a dispute between the vendor and purchaser of shares *Ex parte Shaw*, 2 Q. B. D. 463; where shares had been irregularly allowed to applicant. *Portuguese Consolidated Mines* 42 Ch. D. 160; *Homer district Consolidated Gold Mines*, 39 Ch. D. 546; where the signatory of an underwriting letter not constituted a contract had been placed on the Register. (*Consort & Mines* (1897) 1 Ch. 575; where a shareholder who had made an *ultra vires* surrender of his shares to the company claimed to have his name reinstated *Battery v. Rowland & Marwood's Steamship Co.* (1902) 2 Ch. 14 (C. A.)”.

110. *Madhwa Ramachandra v. Canara Banking Corporation Ltd.*, (1941) 11 Com. Cas. 78 (82).

111. *In re: Keith Prowse & Co.* (1918) 1 Ch. 487.

112. *Ibid.*

113. 22 All 410.

114. 30 B. L. R. 1329

115. 47 Cal. 901.

So also, where an applicant's name had, without sufficient cause, been omitted from and respondent's name had, without sufficient cause, been placed upon the register, it was ordered to be rectified.¹¹⁶ The striking out of a member's name from the register causes his name to be omitted therefrom and accordingly, where a person's name is struck out or expunged, then it is the omission of his name affording him cause for relief.¹¹⁷

Power of Court to rectify the Register:—The Court has power to rectify the Register both before and after the winding up order. The Court has power at the time of settlement of the list of contributories to rectify the Register of Members in all cases where rectification is required in pursuance of the Act. (Sec. 184). It has accordingly been held that the Court has jurisdiction under Section 184 to rectify the Register of Members in all cases where such rectification is allowable in pursuance of Sec. 38.¹¹⁸

Premature application not to be dismissed:—Again, the Court is not bound to dismiss an application under Section 38 as premature on the ground that there has been no refusal to register by a properly constituted Board of Directors for it may treat the defence set up as such refusal.¹¹⁹

Interference with directors' discretion in declining transfers:—The Court has also power to order rectification if there is evidence that the Directors have not properly performed their duties or have acted from improper motives¹²⁰, but if the Directors have *bona fide* exercised their discretion to refuse a transfer within the powers given to them, the Court will not interfere with their discretion or even compel them to state their reasons.¹²¹ Where, however, such reasons are disclosed or evidence is produced as to the reasons the Court can and would consider them.¹²² Accordingly it has been held that where the Articles of Association give discretionary power to the directors to refuse to register a transfer and it appears that the directors have *bona fide* considered the matter, the Court will not compel them to disclose their reasons, but if they do disclose their reasons, or evidence produced as to their reasons, the Court will consider whether those reasons proceeded on a right or wrong principle.¹²³ The reasons for refusing to register a transfer should not be arbitrary, capricious and wanton.¹²⁴ If the Directors refuse to register a transfer, the Court has jurisdiction to determine whether the transferee had a right under the Articles, to have his name registered.¹²⁵ The test of Court's power interfering is, whether, the refusal of Directors to register a transfer is upon grounds on which the power is given to the Directors. Accordingly if the Director's power is expressed to be a right to refuse to register a transfer to a person of whom they do not approve, their object must be something personal to the transferee, e.g., that he cannot pay calls or is a quarrelsome person or is acting in the interests of rival business, but if their refusal is

116. *Imperial Chemical Industries Ltd.*, (1936) 2 All. E. R. 468.

117. *Madhva Ramachandra v. Canara Banking Corporation Ltd.*, (1941) 11 Com. Cas. 78 (82).

118. 40 Bom. 134, in re: *Susser Brack Co.*, (1904) 1 Ch. 598.

119. 22 All. 410.

120. *Coal Port China Co.*, (1895) 2 Ch. 404.

121. *Ex parte Penney*, (1873) 8 Ch. 446 & 22 All. 410.

122. 22 All. 410 & 18 I. C. 481.

123. 22 All. 410.

124. 18 I. C. 481.

125. 14 B. L. R. 719.

on the ground of something which relates only to the transferer, such transfer is made to increase his voting power or is on the ground that the Director desires that only members of a particular family should be shareholders, or that there should not be a member of small holdings, this is an abuse of the power and will be overridden by the Court.¹²⁶ In short the power to reject transfers is a trust to be exercised for the benefit of the company.¹²⁷

Directors assumed to act *bona fide* in absence of proof to contrary:—*Prima facie* the directors are assumed to act *bona fide* just as ordinary trustees in exercising powers are assumed to act *bona fide*. If anybody alleges the contrary the onus is on him to prove it, and if in fact he adduces no evidence at the trial which justifies a conclusion either that there has been no exercise of the discretion or that there has been a *mala fide* exercise of the discretion, then the mere fact that the directors have refused to give any reason for the exercise of the power and for the manner in which they have exercised it, throws no suspicion on them or in any sense shifts the onus to proof so as to put upon them the burden of justifying that which they have done ¹²⁸. The reason of the aforesaid rule was explained by Mellish, L.J., in the leading case of *In re: Graham Life Assurance Society, Ex parte Penney*¹²⁹ as follows:—

“But it is further contended that in order to secure the existing shareholders against being deprived of the right to sell his shares, the directors are bound to give their reason why they reject the transferee, and if they reject him without giving a reason that is a ground for interference. I cannot agree with that. It appears to me that it is very important that directors should be able to exercise the power in a perfectly uncontrollable manner for the benefit of the shareholders but it is impossible that they could fairly and properly exercise it if they were compelled to give the reason why they rejected a particular individual.....I am, therefore, of opinion that in order to preserve to the company the right which is given by the Articles that a shareholder is not to be put upon the Register if the board of directors do not assent to him, and it is absolutely necessary that they should not be bound to give their reasons, although I perfectly agree that if it can be shown affirmatively that they are exercising their power capriciously and wantonly, that may be ground for the Court interfering.....”.

Thus if a shareholder challenges the undoubted right of directors to use their discretion in refusing to register a transfer of shares, when the Articles of Association empower them to use their discretion in the matter for the purpose, the burden lies heavily to that shareholder to allege with particularity and to prove such *mala fides* on the part of Directors as amount to arbitrary and wanton conduct, for it is only when it can be shown that they are exercising their power capriciously and wantonly that it may be ground for Court interfering¹³⁰ but in the absence of the evidence to the contrary, the directors must be taken to have acted reasonably and *bona fide* and are not bound to disclose their reasons, for the exercise of their discretion.¹³¹ In the last mentioned case

126. *In re: Bell Bros*, (1891) 65 L. T. 245.

127. *Bennet's Case*, (1854) 5 De' G. M. & G. 284.

128. *Duke of Sutherland v. B. D. Land Settlement Corporation*, (1926) 1 Ch. 746 per Lord Tomlin.

129. (1873) 8 Ch. A. 446.

130. *Jagdish Prasad v Pars Ram*, (1942) 12 Com. Cas. 21 (25).

131. *Berry & Stewart v. Tottenham Hotspur Football and Athletic Co.*, (1936) 3 All. E. R. 554—53 T. L. R. 100.

the articles of association of the company empowered the directors to decline registration on certain grounds without specifying the grounds for declining the registration of transfer, it was sought to adduce evidence that the directors had refused registration in accordance with a systematic practice to effect transfer in order to prevent an increase in the voting powers of the shareholder. It was held that the evidence as to the rejection of transfers on previous occasions was inadmissible. The Articles of Association restricting transfer of shares must, however, be so construed as not unreasonably to prevent shareholders from fairly and reasonably exercising their powers as members of the company. ¹³²

If the Articles are, however, silent, the directors cannot refuse to register a transfer even when the transfer is made with the object of escaping liability. ¹³³

Remedy lost by laches or acquiescence:—The remedy under Section 38 may be lost if the party applying for rectification of Register is guilty of laches, though more delay in making an application for rectification is no ground by itself why the Court should not exercise its jurisdiction under Section 38. ¹³⁴ Once the shares have been registered in the name of an allottee and he has done acts consistent with his being a member, he will be taken to have agreed to take the shares or at any rate he will be estopped from denying that he has so agreed. ¹³⁵ Consequently where a shareholder does not take action for a long time to have his name expunged from the Register of Members, his right to do so will be barred. ¹³⁶ So also where a shareholder, after the commencement of the winding up, contended that the allotment of shares to his transferor being void, he was not a contributory, it was held that notwithstanding this, he was estopped from denying that he was a member of the company inasmuch as he had duly accepted the share certificates, and the bonus declared on the shares transferred to him and had also attended a meeting of the shareholders. ¹³⁷

Similarly a member can get his name removed from Register on ground that he was induced to take the shares by fraud or misrepresentation in the prospectus provided he makes the application within the reasonable time and before the winding up has commenced. ¹³⁸

Where, however, a transferor claimed rectification of Register on the ground that the restrictions imposed by the articles of association with regard to transfer of its shares were not deserved, it was held that he was not estopped from claiming rectification inasmuch as the transferees were well informed of all the restrictions on the sale of shares. ¹³⁹

Burden of proof:—The onus lies heavily upon the person applying for rectification of Register to show that the entries therein are incorrect and had been made fraudulently or without sufficient cause. ¹⁴⁰

132. *Re: Hobson Houghton & Co.* (1929) 1 Ch. 800.

133. *Gilbert's Case* (1870) 5 Ch. 569 and *Cawley & Co.* (1889) 42 Ch. D. 209.

134. *Mohadevi v Motiram etc. Coal Co.*, (1939) 9 Com. Cas. 181 (Pat.).

135. 28 J. C. 53.

136. A. I. R. 1981 Lah. 700.

137. *Re: Burton (James) & Sons Ltd.*, (1927) 2 Ch. 182.

138. A. I. R. 1923 Lah. 656.

139. *Hunto v. Hunto*, (1986) A. C. 222.

140. A. I. R. 1981 Lah., 157; & 12 Com. Cas. 21

Power of Company to alter its register, apart from S. 38 :—In some English cases it has no doubt been held that the directors have power to rectify the register of members in certain cases, *e.g.*, when there is a mistake of formal nature or when there is no real dispute as to a certain entry therein. The Madras High Court has, however, in a very recent case, ¹⁴¹ taken a contrary view and has held that such a Register is a public document, and there is no provision in the Act which would permit the directors or officers of a company to make any alteration to the Register, and they had recourse to the provisions of S. 38 of the Companies Act if any rectification of the Register is intended, as the company cannot take upon itself to alter the said Register.

BRITISH REGISTER.

A company having a share capital may keep in United Kingdom a Branch Register of Members technically called a British Register. Such company shall within one month from the date of opening the Register aforesaid, file with the Registrar notice of the situation of office where such register is kept and in the event of any change in the situation of such office or of its discontinuance file a notice of such change or discontinuance within a month. (S. 41). The British Register is deemed to be a part of Company's Register of Members and is to be kept in the same manner in which the Principal Register is by this Act required to be kept except that the advertisement before closing the Register must be inserted in some newspaper circulating in the locality where the British Register is kept.

Duties of Company maintaining British Register :—The company must transmit to its Registered Office in India a copy of every entry in the British Register after it has been made and must cause to be kept at such office duly entered up from time to time in duplicate of British Register and the duplicate shall be deemed to be part of the principal Register. Subject to the provision regarding the duplicating register, the share register in British Register shall be distinguished from the share Register, in the principal Register and no transactions with respect to any shares registered in British Register shall be registered in any other register. The company may, however, discontinue to keep British Register and thereupon all entries in that Register shall be transferred to the principal Register. The company may, by its Articles, make such regulation as it may think fit respecting the copying of the British Register. (Sec. 42).

ANNUAL LIST OF MEMBERS AND SUMMARY

Every company having a share capital shall within 18 months from its incorporation and thereafter once at least in every year make a list of all persons who, on the day of the first or only ordinary general meeting in the year, are members of the company and of all persons who have ceased to be members since the date of the last return, or, in case of the first return, of the incorporation of the company. The list must state the names, addresses and occupations of all the past and the present members, therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or, in case of the first return, of the incorporation of the company and the dates of registration of the transfers. It must also contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash. It must further specify the following particulars :—

141. *Damodara Reddi v. Indian National Agencies*, I. L. R. 1945 Mad 728 = A. I. R. 1946 Mad 85

- (a) The amount of the share capital of the company and the number of the shares into which it is divided ;
- (b) the number of shares taken from the commencement of the company up to the date of the return ;
- (c) the amount called up on each share ;
- (d) the total amount of calls received ;
- (e) the total amount of calls unpaid ;
- (f) the total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount, (in respect of any shares or debentures) since the date of the last return (or so much thereof as has not been written off at the date of the return) ;
- (g) the total number of shares forfeited ;
- (h) the total amount of shares or stock for which share warrants are outstanding at the date of the return ;
- (i) the total amount of share-warrants issued and surrendered respectively since the date of the last return ;
- (k) the number of shares or amount of stock comprised in each share warrant ;
- (l) the names and addresses of the persons who at the date of the return are the directors of the company and of the persons (if any) who at the said date are (the managers or managing agents of the company, and the changes in the personnel of the directors, managers, and managing agents since the last return together with the dates on which they took place) ; and
- (m) the total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act.

The list and the summary referred to above must be contained in a separate part of the Register of Members and must be completed within 21 days after the date of the first or the only ordinary general meeting in the year and the company must forthwith file with the Registrar a copy thereof signed by the director or by the Manager or Secretary of the company together with a certificate from such director, manager, or secretary, as the case may be, that the list and the summary state the facts as they stood on the day aforesaid.

In case of a private company the certificate must further state that the company has not, since the day of the last return or in case of a first return since the date of its incorporation, issued any invitation to the public to subscribe for any shares or debentures of the company and where the return discloses more than 50 members, it must also state that the excess consists wholly of persons in the employ of the company who under Section 2(1) (13) (b) of the Act are not to be included in reckoning the number of fifty. Section 32(1) to (14). Section 134 of the Act further requires except in the case of a private company, that copies of the last balance sheet and the auditors' report must also be filed with the annual list and the summary aforesaid.

Penalty for default :—If a company makes default in complying with the aforesaid provisions relating to the annual list of members and summary, it is liable to a fine not exceeding Rs. 50 for every day during which the default continues and every officer of the company who knowingly and wilfully authorises or permits the default, is liable to the like penalty. (S. 32(5).

While a company is always liable if it makes default, the officers of the company are liable only if they knowingly and wilfully authorise or permit the default but not otherwise. ¹⁴²

STOCK

Conversion of shares into stock :—Fully paid-up shares may be converted into stock. The conversion of stocks means in fact putting a set of shares together in a bundle with this peculiarity added to them that they are transferable in a manner in which ordinary shares cannot be transferred. The advantage of stock over shares is that while shares in a company as shares cannot be bought in small fractions at any amount, the consolidated stock of a company can be bought just in the same way as the stock of the public debt split up into as many portions as one likes and sub-divided into as small fractions as desired. ¹⁴³ But independently of that it possesses all the qualities of the shares. In fact it is simply a set of shares put together in a bundle. (*Ibid*).

Conversion of fully paid-up shares into stock :—A company limited by shares may, in general meeting of the company, if so authorised by its Articles convert all or any of its fully paid-up shares into stock and reconvert that stock into paid-up shares of any denomination. (Sec. 50 (i) (c).)

Effect of such conversion :—Where a company has converted any of its shares into stock, it must file notice of the conversion with the Registrar and thereafter all the provisions of the Act which are applicable to shares only shall cease as to so much of the share capital as is converted into stock and the Register of Members of the company and the list of members to be filed with the Registrar shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to the shares required under Section 32 of the Act. (S. 52). The other particulars become unnecessary in view of the fact that only fully paid-up shares can be converted into stock.

Difference between shares and stock :—As pointed out by Lord Cairns in *Morrice v. Aylmer* ¹⁴⁴.

“The use of the term stock merely denotes that the company have recognised the fact of the complete payment of the shares and that the time has come when the shares may be assigned in fragments which for obvious reason could not be permitted before, but that stock shall be a qualification, e.g., of directors who must possess certain number of shares and that the meeting shall be of persons entitled to this stock who meet and vote as shareholders in the proportion of shares which would entitle them to vote before the consolidation into stock.”

¹⁴². *Public Prosecutor v. P. V. A. Lury Co.* (1940) 11 Com Cas, 381 = (1941) 2 M. L. J. 487.

¹⁴³. *Morrice v. Aylmer*, 7 H. L. 717 (725).

¹⁴⁴. (1874) 10 C. A. 148 (154).

PLEDGE OF SHARES OR STOCK

Stock and shares—whether goods—so as to be capable of pledge :—There is a difference of opinion as to whether stock and shares would be 'goods' within the meaning of Section 172 of the Indian Contract Act, so as to be capable of pledge. According to Calcutta High Court they are not goods for the purposes of the aforesaid Section,¹⁴⁵ while the Bombay High Court has taken the view that they are goods.¹⁴⁶ In a recent Letter Patent case,^{146 a} *Kunhuni Elays Nayar v. Krishna Pattar* the Madras High Court has preferred the Bombay view and dissented from the judgment of a single judge in *Krishna Pattar v. Kunhuni Elays Nayar*¹⁴⁷, which has been reversed in the Letter Patent appeal aforesaid. The following extract from the judgment of that case is worthy of note :—

"In *Lalit v. Haridas* (1916) 24 C. L. J. 335), the Calcutta High Court held that share certificates are neither goods nor documents of title within the meaning of Section 178 of the Contract Act, but this decision was given before the enactment of the Sale of Goods Act and, therefore, before the amendment of the Contract Act. On the other hand, the Bombay High Court, long before 1930, held that the term 'goods' used in S. 178 of the Contract Act includes shares in the joint stock companies and consequently recognises that there could be a valid pledge of shares. See *R. D. Sethana v. National Bank* (1910) 12 B. L. R. 870, *Fazal v. Mangaldas* (1921) 46 Bombay 489 and *Jamshedji v. Maganlal* (1925) 27 B.L.R. 514. It seems to us that even before the passing of the Sale of Goods Act, the Bombay opinion was preferable to the Calcutta opinion, but as the result of the passing of the Sales of Goods Act and the amendment of the Contract Act we consider that the Bombay opinion is not open to dispute. We can see no valid reason for giving the word 'goods' a different meaning in Contract Act from the meaning which it has in the Sale of Goods Act".

Their Lordships further observed :—

"We think that when a person delivers a share certificate to another to be held by him as security, there is under the law of India pledge which he can enforce but unless the pledgee at the time of deposit secures the deed of transfer which he can use in the case of necessity or obtains one from his debtor at a later stage, he must have recourse to Court when he wishes to enforce his security".

SHARE WARRANTS

A limited company (except a private one) may, if so authorized by its Articles, issue with respect to any fully paid-up share or stock, a warrant under its common seal stating that the bearer of the warrant is entitled to the shares or stock therein specified and may provide by coupons or otherwise for the payment to future dividends on the shares or stock included in the warrant. Such warrant is termed as "share warrant". The share warrant shall entitle its bearer to the shares or stock therein specified and the shares or stock may be transferred by delivery of the warrant (Section 44). The bearer of the share warrant may, if so authorised by the Articles, surrender it for cancellation in order to have his name entered as a member in the Register of Members (Section 45). The

145. *Lalit Mohan Nandi v. Hari Das Mukherjee*, (1916) 24 C. L. J. 835.

146. *R. D. Sethna v. The National Bank of India*, (1910) 12 B. L. R. 870; *Jamshedji v. Maganlal*, (1925) 27 B. L. R. 514; and *Fazal v. Mangaldas* (1921) 46 Bom. 489.

146 a. *Kunhuni Elays Nayar v. Krishna Pattar* (1942) 13 Com. Gas. 180

147. (1941) 11 Com. Cas. 63.

bearer of the share warrant may, if so authorised by the Articles, be deemed to be a member of the company, either to the full extent or for any other purposes defined in the Articles, but he shall not be qualified in respect of the shares or stocks, specified in the warrant to be a director or manager of the company, in cases where such a qualification is required by the Articles. (Section 46). On the issue of share warrant the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stocks specified in the warrant as if he had ceased to be a member and shall enter in the register the following particulars, namely :—

- (i) the fact of the issue of warrant ;
- (ii) a statement of the shares or stock included in the warrant distinguishing each share by its number; and
- (iii) the date of the issue of the warrant (Section 47).

Until a warrant is surrendered, the above particulars shall be deemed to be the particulars required by the Act to be entered in the Register of Members and, on a surrender the date of surrender shall be entered as if it were the date on which a person ceased to be a member (Section 48).

Difference between share warrant and share certificate :—The share warrants, unlike share certificates, can only be issued if (i) the company is authorized to do so under its articles ; (ii) and only in respect of fully paid—up shares. They are Negotiable Instruments according to Section 44 of the Act while share certificates are not Negotiable Instruments even when accompanied by blank transfers.¹⁴⁸ A share certificate is *prima facie* evidence of the title of the member to the shares and stock therein specified while the share warrant is security itself. Again the holder of a share certificate is always a member of the company while the holder of a share warrant is a member of the company only if the Articles of the Company so permit.

LIEN.

Prima facie a company has no lien on the shares of its members.¹⁴⁹ But the articles of a company may and usually do provide that the company shall have first lien on the shares of each member for his debts and liabilities to the company. Where there is a provision for lien, the power is also given by the articles to the company to enforce such lien by the sale of shares. The Regulation 9 of Table A, provides for lien on every share other than fully paid up one standing in the name of a member for all moneys whether presently payable or not and provides that such lien shall extend to all dividends payable thereon. Regulations 10, 11 of the aforesaid Table provide for the enforcement of such lien by a sale. Where the Articles of a company do not provide for a lien, a lien clause may be adopted by a special resolution. Fully paid up shares can also be brought in so as to be subject to the lien by a proper alteration of the Articles.¹⁵⁰ A company has, however, no lien on the fees due to its directors.¹⁵¹

148. *Hazarimal v. Satish Ghosh*, 46 Cal. 381.

149. *Pinkett v. Wright*, 2 H. A. 120.

150. *Ellin v. Gold Reef of Africa*, (1900) 1 Ch. 656 ; in re : *Rowe*, (1904) 2 K. B. 489.

151. *Punjab Electric Power Co. v. Suraj Kishan*. (1936) 164 I. C. 566,

Lien may be assigned :—The lien is an equitable charge and is transferable. Thus if the company has a lien on the shares of a member for a debt which he owes to the company, on calls and subsequently the member aforesaid raises the money from another person to pay his debt to the company, the former can call on the company to assign its lien to the latter.¹⁵²

Lien as against a third person :—There is a divergence of opinion as to whether the company having a lien on the shares is entitled to priority as against the creditor of the shareholder when it lends money after notice of the claim of the creditor. The better view appears to be that a company is liable to be affected with notice of any equitable interest which the third party indicates to it,¹⁵³ and accordingly if a company, in face of such notice that the shareholder is not the beneficial owner of the shares, makes advances or gives credit to the latter, it is not protected by Section 33 of the Indian Companies Act or by the provisions to that effect in the Articles of Association and consequently cannot assert against the beneficiaries a lien on the shares for the indebtedness of the members.¹⁵⁴ Accordingly where a member mortgages his share to a third person who gives notice to the company of such mortgage and thereafter the shareholder concerned incurs a liability to the company, the mortgagee would have priority, over the company's lien.¹⁵⁵ The lien does not cease on the death of a member but continues to be available against his legal representatives.¹⁵⁶ Though a company is not bound to recognise a trust in respect of its shares yet that would not prevent the Court from considering the rights between the parties and the propriety of the dealings made by the company after notice of the trust given by the beneficiaries. There is nothing to prevent a Court from recognising a trust in a suit in which the evidence of the trust is forthcoming.

A company is, however, under no obligation to enquire about or take notice of the equitable interest and if, therefore, a sole holder of the shares be a trustee, the lien will attach even in respect of his private debts to the company and will prevail over the title of the *cestui que trust*.¹⁵⁶ It has, however, been held that the right of trustees to sell the shares belonging to the Marriage Settlement Trust in execution of their trust is not affected by the company's lien against the debtor trustees (who are also beneficiaries in the settlement) personal interest and the trustees can give unencumbered title to a purchaser of the shares.¹⁵⁷

Enforcement of lien :—Articles of a company usually empower it to enforce its lien by sale of shares after default. If the shareholder or his transferee, however, pays up the amount due, he is entitled to require the company to assign the debt and the lien on the shares to his nominee.¹⁵⁸ In the absence of a provision in the articles empowering the company to exercise its right of sale in respect of the lien, it is doubtful if the company

152. *Everlet v. Automatic etc. Co.*, (1892) 3 Ch. 506.

153. *Ramford v. James Keith & Blackman Co.*, (1905) 2 Ch. 147.

154. *Mackereth v. Wigan Coal & Iron Co.*, (1916) 2 Ch. 293; A. I. R. 1933 All. 607.

155. *Bradford Banking Co. v. Henry Briggs*, (1886) 12 A. C. 29.

155a. *Tenant v. Turner* (1938) Ch. 593.

156. *New London & Brazilian Bank v. Brackley Bank*, (1882) 21 Ch. D. 301.

157. *Mathieson v. Crown*, (1929) 141 L. T. 553.

158. *Everlet v. Automatic Co. etc.*, (1892) 3 Ch. 506.

can exercise such power. In such a case an action would have to be brought in Court of law for the enforcement of the lien.¹⁵⁹ The lien, however, is not usually enforced by sale unless a notice in writing fixing time for a payment and demanding payment in respect of which the lien exists, has been given to the registered holder of the shares in question. (*Vide* Regulation 10 of Table 'A'). Sometime the articles provide that a lien may be enforced by forfeiture but such a provision is not effective firstly because the lien is in the nature of an equitable mortgage and consequently a clause for forfeiture would be inoperative in equity being a clog on the equity of redemption on the principle that "once a mortgage is always a mortgage,"¹⁶⁰ and secondly the forfeiture of shares for non-payment of an ordinary debt would amount to a reduction of capital and as such would be invalid.¹⁶¹

Waiver of lien :—It is always open to the company, if it so chooses, to waive a lien.¹⁶² Besides, company's lien would be lost if it does anything showing an intention to waive the same, *e.g.*, where it registers a transfer of shares subject to the lien.¹⁶³ In the case of a transmission of shares, however, they continue to be subject to the original liabilities, and if there was any lien on the shares for any sum due, the lien would subsist notwithstanding the devolution of shares and their consequent registration by the directors of the company. In such a case the lien would attach to the shares in the hands of the legal representatives.¹⁶⁴

Refusal of a director to transfer on grounds of company's lien :—The directors of a company can only refuse to register a transfer of shares belonging to a debtor shareholder in case where, under the articles, they have a lien on those shares by reason of that indebtedness.¹⁶⁵ Where, however, the articles of association of a company gave the company a permanent lien upon all the shares other than fully paid up share registered in the name of each member for moneys due or payable on any account whatever to the company, it was held that under the Articles, no lien was given to the company over fully paid-up shares and that, therefore, the transferees were entitled to have the transfer of such shares registered and their claim on the equitable mortgage in their favour recognised and the company having no lien was not entitled to set up transfer's indebtedness to it in priority to the claim of the transferees.¹⁶⁶

159. *New London & Brazilian Bank*, 21 Ob. D. 302.

160. *Salt v. Marques of Northampton*, (1892) A. C. 1.

161. *Hopkin v. Mortimer Harley & Co.*, (1917) 1 Ch. 646.

162. *Bank of Africa v. Salisbury Gold Mining Co.*, (1892) A. C. 281.

163. *Northern Assam Tea Co.*, 10 Eq. 458.

164. *Thenatta Chettiar v. Indian Overseas Bank*, (1949) 18 Com. Cas. 202 (207).

165. *Scolton Malleable Iron Co.* (1875) 2 Ch. D. 101.

166. *Official Liquidator Madras Cloth Market Ltd. v. P. & O. Banking Corporation*, 57 Mad 955.

CHAPTER IX

TRANSFER AND TRANSMISSION OF SHARES

TRANSFER OF SHARES.

The Nature of the right to transfer shares:—The right of transfer is a statutory right given by Section 28 of the Act exercisable, however, subject to the Articles of Association of the company. The last mentioned Section provides:—

“The share or other interest of any member in a company shall be moveable property, transferrable in manner provided by the articles of the company.”

So unless the articles otherwise provide, a shareholder has a free and unrestricted right of transfer.¹ Accordingly, where the articles impose no restrictions on the rights of transfer, it has been persistently held that the shareholders can freely transfer their shares without obtaining the consent of the directors, who cannot refuse to register such transfers, even when the avowed object of such a transfer is to escape liability on the eve of winding up.²

Restrictions on the right of transfer:—There is nothing to limit the restrictions which a company's articles may place on the right of transfer.³ Accordingly, where any shares were transferred option to purchase them should be given to the other shareholders, it was held that the restriction aforesaid was not invalid.⁴ Where the restrictions imposed by the articles of association of a company with regard to the transfer of its shares were not observed by the parties to the transfer, it was held that there was no effective sale of shares.⁵ The regulation 20 of the Table A annexed to the Act provides, *inter alia*, that the directors may decline to register any transfer of shares, not being fully paid up shares, to a person whom they do not approve and may also decline to register any transfer of shares on which the company has a lien. But the articles may, and in most cases do, go beyond this. As observed by Lord Wrenbury, “Shares are *prima facie* transferrable. But there is no law which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction

1. *Weston's Case*, 4 Ch. A. 20.

2. *De Passe's Case* 4 De. G. & J. 544; *Delavenne v. Breadhurst*, (1930) W. N. 238; *Gilbert's Case*, 5 Ch. 559; *Cawley & Co.*, 42 Ch. D. 209; *Pool Shipping Company Limited*, (1920) 1 Ch. 251; & *Lindlar's Case*, (1901) 1 Ch. 812.

3. *Cawley & Co.*, 42 Ch. D. 209.

4. *Borland v. Steel*, (1901) 1 Ch. 279.

5. *Hunt v. Hunt*, (1936) A. C. 292.

which they choose to agree to. It may be for the benefit of the company that, for instance, shares shall not be transferred to rivals in the company's trade. A restriction which precludes a shareholder altogether from transferring may be invalid but a restriction which does no more than give right of pre-emption is valid."⁶ As was also pointed out in the case of *Moffatt V. Tarquhar*,⁷ "this right of transfer is a right of property; and if the directors have an arbitrary power, from any fancy they choose to take up, to say there shall be no transfer, that is an annihilation of property". Where the articles give the directors a discretionary power to decline to register a transfer, they must exercise it reasonably as such power is of a fiduciary nature and must be exercised in good faith in the interest of the company. It must not, therefore, be exercised corruptly, fraudulently, arbitrarily, capriciously, wantonly or for a collateral purpose.⁸ Again, it has been held in this connection that "a power for directors to refuse to register transfers of shares if, in their opinion, it is contrary to the interests of the company, that the proposed transferee should be a member thereof only justifies a refusal to register upon grounds personal to the proposed transferee"⁹ It has, consequently, been held that it is an abuse of the powers of directors to decline to register a transfer on any ground not applying personally to the transferee.¹⁰ In the last-mentioned Bombay case^{10a} the directors refused to register a transfer because the transferees refused to pledge themselves not to approve of a certain change in the mode of remunerating the company's agents, which the directors desired to effect. It was held that the objection was not personal to the transferees. The power cannot, however, be exercised until the question of each transfer together with the name of the transferee and the transferor is before the directors and they have an opportunity of considering each case.^{10b}

The law on the subject is, as observed by Chandrasekara Iyer, J., in a recent Madras Case,¹¹ is found in *Bede Steam Shipping Co. Ltd.*,^{11a} in re: where the earlier decisions in *Ex parte Penney*,^{11b} in re: *Coalport China Co*,^{11c} and in re: *Bell Brothers*^{11d} are all considered and discussed. The right of transfer is absolute as it is inherent in the ownership of the shares, but it can be restricted by contract, which has to be found in the articles of association. Even in a case where the power to refuse registration is conferred in absolute

6. Bom. L. R. 1929.

7. (1877) 7 Ch. D. 591 at page 605.

8. In re: *Bell Brothers Ltd.*, *Ex parte Hodgson*, 7 T. L. R. 689 = (1891) 65 L. T. 245; Re: *Bedi S. S. Co.*, (1917) 1 Ch. 123 & 22 All 410.

9. In re: *Bedi Steam Shipping Co.*, (1917) 1 Ch. D. 123.

10. *Per Mellish, L. J.*, in *Ex parte Penney* (1872) 3 Ch. 446; *Cassell v. Inglis*, (1916) 2 Ch. 211; *Moffatt v. Farquhar*, (1877) 7 Ch. D. 591; 22 All 410 & 16 Bom. 80.

10a. 16 Bom. 80.

10b. 23 Bom. 68.

11. *Thenappa Chettiar v. Indian Overseas Bank Ltd.*, (1943) Com. Cas. 203 (208).

11a. (1917) 1 Ch. 123.

11b. (1872) 3 Ch. 446.

11c. (1895) 2 Ch. 404.

11d. 65 L.T. 245,

terms, the refusal must not be arbitrary. Provided, they act in a *bonafide* manner, the directors are not bound to give any reasons. But if they give reasons, the Court can examine them, but it will not over rule the decision of the directors merely on the ground that it would have reached a different conclusion. If the directors refuse registration on any wrong principle, their act can be rectified. The true legal position as regards this discretionary power of directors to refuse or reject transfers is thus stated in the 11th Edition of Buckley on Companies Act at p. 139.

"If the directors do give their reasons, the Court will then consider whether they are legitimate or not, that is, whether the directors have proceeded on a right or wrong principle, and will over rule their decision, if their reasons are not legitimate, but not, if they are legitimate, merely because the court would not have come to the same conclusion. The Court will also overrule the directors' decision where, although they have given no reasons, it is proved that they have acted on a wrong principle or otherwise than *bonafide*. The principles applicable are exactly the same whether the power of rejecting transfers is absolute or limited to particular grounds."

It may be noted that in the Madras case referred to above, one of the articles of the company empowered the directors in their absolute and uncontrolled discretion to refuse to register any proposed transfer of shares even in a case where the proposed transferee was already a member. It has also been held in the aforesaid case that when the consent of directors is withheld for reasons which do not stand scrutiny and no objection is raised of a personal kind against the transferee to recognise the power in the directors, to refuse the transfer is to countenance an abuse of powers vested in them.

Mode of transfer and procedure thereto :—The normal mode of transfer is as follows:—

The transfer deed and power of attorney are signed by the registered shareholder whose name appears on the face of the share certificates and his signature is attested by a witness. The name of the transferee is filled in and the documents are taken to the office of the company; the certificates are surrendered and cancelled and a new certificate is issued to the transferee whose name has been entered on the register. ¹²

Sub-section(3) of Section 34 of the Indian Companies Act, however, makes it compulsory for both the transferor and the transferee to execute the deed of the transfer which must, after its due execution, be delivered to the company along with the scrip after being duly stamped in accordance with the provisions of the Indian Stamp Act. An article purporting to confer power on directors to transfer shares in the absence of an instrument of transfer has, consequently, been held to be *ultra vires*. ¹³

12. *Colonial Bank v. Hepworth* (1887) 86 Ch. D. 44 : 56 L. J. Ch. 1089.

13. *Madhava Ramachandra Kamath v. Canara Banking Corporation Ltd.*, (1941) 11 Com. Cas. 78.

The application for the registration of the transfer of shares may be made either by the transferor or the transferee but where such application is made by the transferor and the shares in respect of which a deed of transfer has been executed are partly paid up, no registration shall be effected unless the company gives notice of the application to the transferee. In the last-mentioned case the transferee is entitled to make objection to the transfer within 2 weeks from the date of receipt of the notice aforesaid and if no objection is made by him within the time aforesaid, the company shall enter in the Register of Members the name of the transferee as if the application for registration was made by him (transferee). In case the company refuses to register a transfer of any shares or debentures, it must send to the transferee and the transferor notice of such refusal within two months from the date on which the instrument of transfer was lodged with the company. If default is made in this respect, the company and every director, manager or secretary or other officer of the company who is knowingly a party to the default, is liable to a fine not exceeding Rs. 50 for every day during which the default continues. (S. 34).

The above mentioned procedure and the rules, however, relate to regular transfers. According to a practice which has extensively prevailed, has been recognized and acted upon, the transferor signs the deed of transfer and power of attorney without filling the name of the transferee and attorney and these blank transfers readily pass on the market from hand to hand by delivery only, until the documents reach the hands of some holder who desires to be registered. His name is then filled in by himself or on his behalf. The documents are then left with the company, the certificates are cancelled, the transfer is registered and new certificates in his name are issued in the manner already described. The plain legal effect of this recognized practice is that the transferor who executes in blank, confers on the holder of the documents for the time being an authority to fill in the name of the transferee and each successive holder for the time being when the documents pass through several hands, passes on this authority. The holders must, of course, be *bona fide* holders for value without notice.¹⁴ If, however, the regulations require the transfer to be by deed, the transferee cannot effectually fill up the blank and deliver the deed unless authorised so to do by power of attorney under seal, whereas if the transfer may be under hand merely, the authority to fill up the blank may be oral and may be implied from the nature of the transaction.¹⁵

Thus when the endorsed transfer has been duly executed by the registered owner of the share, the name of the transferee being left blank, delivery of the certificate in that condition by him or by his authority transmits his title to the shares both legal and equitable. The person to whom it

14. *Colonial Bank v. Hepworth* (1887) 36 Ch. D. 44 : 56 L. J. Ch. 1089.

15. *Palmer's Company Law*, 18th Edition, Page 292 quoted with approval in *Bengal Silk Mills* (1942) 12 Com. Cas. 206.

is delivered can effectually transfer his interest by handing his certificate to another and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee and to present the document to the company for the purpose of having his name entered in the Register of Members and obtaining a new certificate in his own favour. The delivery does not, however, invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right, notwithstanding his having parted with the certificate, and transfer to the original transferor, who is entered as owner in the certificate and Register of Members, continues to be the only shareholder recognised by the company, as entitled to vote and draw dividends in respect of the shares until the transferee or holder for the time being obtains registration in his own name. It would, therefore, be more accurate to say that such delivery passes, not property of the shares but a title legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner.¹⁶

The transferee in cases of transfer in blank has right to fill in the necessary particulars including his own name as transferee and the date of transfer even after the death of the original transferor. Accordingly, in the case of a transfer executed in blank, if the transferor dies before the ultimate transferee's name has been consequently filled in, that would not in any way affect the right of such transferee to get his name registered. The reason is that so far as the transferor is concerned, he loses his right in the shares as soon as he executed transfer in blank. The transfer is good as against him even though the transferee has not filled up the form. If it were otherwise the vast amount of business done by means of blank transfers would have to cease, because it would be quite impossible in many cases to ascertain without much trouble and inconvenience whether the original transferor was alive or not.¹⁷

What does not amount to deed of transfer:—Where a document purported to be an agreement of transfer accompanying the actual instrument of transfer while the latter had not been completed so far as the transferor could complete it, the document by itself would be nothing more than an enforceable agreement to convey. Such document would not by itself amount to a transfer deed sufficient to cause title to pass.¹⁸ In case of breach of such agreement the proposed vendee can recover damages for such breach. The difference between the price agreed on and the market price on the day on which the sale should have been completed, would be the proper measure of damages. The vendee is, however, not

16. *Colonial Bank v. Cady*, (1890) 15 A. C. 267 (277) : 60 L. J. Ch. 131.

17. *Bengal Silk Mills Co. Ltd., in re* : (1942) 12 Com. Cas. 206.

18. *C. Kuppiah Chetty v. P. Saraswathi Ammal*, (1941) 11 Com. Cas. 334.

entitled to damages, in respect of a further rise of price taking place afterwards at the time of actual issuing of the scrip.¹⁹

Certification of transfers :—By the custom of the Stock Exchange when shares are transferred, it is usual for the transferor to hand over to his broker, the certificate of shares transferred along with the instrument of transfer. Before making over the deed of transfer to the broker of the other side, the transferor's broker lodges the shares certificate at the office of the company whereupon the secretary of the company certifies the fact on the margin of the deed of transfer. Certification by the Secretary as aforesaid is accepted by the purchaser's brokers as evidence that the transferor has a title to the share transferred. Where, however, a person holding one share certificate in respect of the number of shares, transfers only some of them, "a balance ticket" is usually handed over to the brokers for the remaining shares to be exchanged later on for a new share certificate. In the last-mentioned case, the company issued two new certificates, one for the transferee in respect of the shares transferred to him and the second for the transferor in respect of the remaining shares.

Where the Secretary of a company is permitted to certify transfers, his authority on that behalf only extends to acknowledging the receipt of certificates which are in fact lodged and if, therefore, he certifies a transfer when no certificate has in fact been lodged, his statement in that behalf is not in law the statement of the company and the latter is not estopped by the certification of its secretary, for it cannot be supposed that a company authorises the secretary to do more than giving a receipt for certificates that are actually lodged.²⁰

TRANSMISSION OF SHARES

Difference between transfer and transmission :—Transfer and transmission are quite distinct from each other. The former is based upon the act of the parties; while the latter is the result of the operation of law.²¹ On the holder of shares dying, being found a lunatic or bankrupt, the company has to deal with the legal representatives of the former holder and a case of transmission of shares, as opposed to one of transfer, thus occurs. Articles of company usually provide for such cases. The sub-section 6 of Section 34 further preserves the power of a company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.

19. *Tempest v. Kilner*, (1846) 136 E. R. 100.

20. *Klienwort Sons & Co. v. Associated Automatic Machine Corporation*, (1934) 151 L. T. 1; and *White Church v. Cavanagh*, (1902) A. C. 117.

21. *Thennappa Chettiar v. Indian Overseas Bank Ltd.*, (1943) 13 Com. Cas., 202 (207).

Thus the formalities provided for in the case of ordinary transfer under Section 34 of the Act, are not to be observed in the last mentioned case.

Insolvency or bankruptcy of a shareholder—effect of :—In the case of a shareholder becoming a bankrupt or insolvent, his properties vest in the Official Assignee or in the Receiver according as he is governed by the Presidency Towns Insolvency Act or the Provincial Insolvency Act, unless the Articles otherwise provide. The Official Assignee or the Receiver as the case may be, can either have himself registered as the holder of the shares of the bankrupt or insolvent, leave them in the name of the bankrupt, transfer them without first taking them into his own name or disclaim them; but where the shares were charged by the insolvent prior to his insolvency he cannot disclaim them so as to destroy the security or affect the rights of third parties.²²

Where, however, the trustee takes the shares into his own name, he can insist upon a clean entry, that is to say, he can object to an entry in the Register of Members or upon the certificate that he holds them as a trustee or subject to lien.²³ When the trustee elects to get the partly paid up shares registered in his own name, he becomes liable for calls thereon, while if he leaves them in the name of the bankrupt only the estate of the latter is liable.

Death of shareholder—procedure in case of :—In the case of the death of a shareholder where the Articles do not provide for the recognition of executors or administrators alone, it would seem doubtful if the company could insist upon heirs of a Hindu or Mohammadan shareholder to take out letters of administration or probate as the case may be, in respect of the shares standing in the name of deceased inasmuch as it is not incumbent on them to take out letters of administration or probate, in view of Section 212 (2) of the Indian Succession Act.²⁴ Provision in this respect should, therefore, be made in the Articles of Association of the company. In a recent Madras case, however in a case of devolution under will, where the articles of company expressly provided that "the executor or administrator of a deceased member shall be the only person recognised by the company as having any title to his shares and the company is not bound to recognise the executor or administrator unless he shall have obtained probate or letters of administration," it was held that the company could not insist on the production of probate or letter of administration, when a succession certificate had been granted in respect of the shares of the deceased, as such certificate affords full indemnity to the company.²⁵ Cases may also arise where shares

22. *Wise v. Lansdell*, (1921) 1 Ch. 420.

23. *W. Key & Sons Ltd.*, (1902) 1 Ch. 467.

24. *Secretary of State v. Prajit Devi*, 63 I. A. 61.

25. *Thanappa Chettiar v. Indian Overseas Bank Ltd.*, (1943) 13 Com. Cas. 202.

in a company have been purchased by the Karta of the Joint Hindu Family out of the joint family fund but are registered in his own name. In such a case the succeeding managing member of the family is entitled to be registered.²⁶

In the absence of the provision in the Articles that the directors shall, in case of transmission of shares, have the same right to decline or suspend registration as they would have had in the case of transfer of shares by the deceased or insolvent person before the death or insolvency, the directors would not be entitled to refuse to register the name of a person who becomes entitled to the shares by transmission.²⁷ Accordingly, where an executor has the legal right to the shares of which the deceased testator was the registered holder, he is, in the absence of any power of veto conferred on the company by its articles, entitled to have his name entered on the Register if he so desires as ancillary to his legal right to the shares in question.²⁸

26. *Piare Lal v. Muir Mills Ltd.*, 41 Cal. 619.

27. *In re : Betham Mills Co.*, 11 Ch. D. 900.

28. *Scott v. Frank Scott (London Ltd.)*, (1941) 11 Com. Cas. 127 (187).

CHAPTER X

CALL, FORFEITURE AND SURRENDER

What is a "call":—Members of a company are liable to pay to the company to the extent of the nominal amount of their shares. A demand is usually made by the company on its shareholders to pay the whole or part of such amount at any time when the company is a going concern by the directors in accordance with its Articles and thereafter by the liquidator in the course of its winding up. Such demand is technically termed a 'call', which really means the application to the shareholder to pay and the amount to be paid.

Section 21 (2) provides that all moneys payable by any member to the company under the Memorandum or Articles, shall be a debt due from him to the company. But it is only money which is presently due which can be described as a debt.¹ In the last-mentioned case a distinction between money which is due and money which is presently due has been pointed out and it has been held that money does not become presently due merely because signatories of the memorandum and articles of association have undertaken to purchase shares and pay for them, in the absence of any valid resolution of the Board of Directors requiring such payment. Thus a call properly made on a member shall be deemed to be a debt due from him to the company. The liability, however, created by a call is not enforceable against a member unless it is proved that a valid notice of the call was served upon him in accordance with the Articles of the company.²

Kinds of a call:—There are two kinds of call. First of these are those which are nothing more than unpaid portions of the nominal capital of a company; and secondly there are those calls which are contributories required after that capital has been raised and exhausted. Calls of the first kind are payable by virtue of the agreement entered into by the subscribers and the shareholders to contribute the sum fixed upon as the capital; but calls of the last kind are payable in consequence of the liability of shareholders to discharge their debts. If this liability is unlimited, the amount of calls (of the 2nd kind) which a shareholder may be compelled to pay depends entirely on the amount of the debts to be liquidated and upon the number of the solvent shareholders. But no shareholder can be required to pay calls of the first kind beyond his unpaid proportion of the capital of the company—Lindley Law of Companies, 6th Ed., Page 573 quoted with approval in (1941) 11 Com. Cas. 70 (73).

1. *Vishwa Nath Prasad v. Holyland Cinetone*, (1939) 9 Com. Cas. 324 (All)

2. *Pabna Dhana Bhandar Ltd. v. Fayzuddin*, 59 Cal 1186.

Essentials of a valid call:—The conditions precedent for a valid call are : (i) That the persons acting as directors were duly appointed³ and duly qualified,⁴ (ii) that there was a duly convened meeting of the Board of Directors,⁵ (iii) that a proper quorum was present thereat,⁶ and (iv) that the resolution making the call was duly passed specifying the amount of call, the time and place of payment and to whom the call is to be paid.⁷

If the resolution does not specify the particulars mentioned above, it may be bad in law for there can be no valid call until the time and place for its payment has been appointed by the Board of Directors of the company.⁸ Such time and place for payment of the call may, however, be fixed by a subsequent resolution or direction of the Board and consequently if the original resolution making the call does not specify either the time or the place for payment but the same is fixed by a subsequent resolution or direction of the Board, the call would not be invalid.⁹ It follows, therefore, that the resolution to make call need not, in the first instance, specify either the time or the place for payment but the Directors must appoint the time and place which must be notified to the shareholders by a notice allowing them time for the purpose of payment. The resolution is nothing more than determination that thereafter a call shall be made i.e., an application shall be made to each shareholder for a proportion of his shares and it is only made if the Directors appoint a time or place either by public advertisements, if allowed by the Act or the Articles or by an individual notice to each shareholder.¹⁰ Accordingly it is not necessary that the persons to whom and the place at which the call is to be paid should be mentioned in the resolution making the call and the Article is complied with if the directors appoint the persons and the place ; even though informally, before the notice of call is sent out.¹¹ In the last mentioned case Lord Beaumont, C.J. observed in the course of his judgement as follows :—

“This seems to me that the directors may (as they did in this case) pass a resolution making the call of a particular amount payable at a particular time and that that resolution constitutes a valid call and fixes the date of call, although before the payment of the call can be enforced, the directors must appoint the persons to whom and the place where the call is to be paid.”

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3. *Howbeach Coal Co. v. Teagu*, 5 H. & N. 151.
 4. *Ironship & Co. v. Blunt*, 3 O P. 484.
 5. *Garden Gully United Quarters Mining Co. v. Mc. Lister*, 1 A. C. 46.
 6. *Austin's Case*, (1871) 24 L. T. 982.
 7. *Cale & Co, In re* : 42 Ch. D. 29.
 8. *The Pioneer Elkhly Works Ltd. v. Amiruddin*, 28 B. L. R. 411.
 9. *Johnson v. Lyttles Iron Agency*, 5 Ch. D. 687.
 10. *Bengal Electric Lamp Works Ltd.*, (1942) 12 Com. Cas. 238.
 11. *Dhunraj v. Wadia*, 35 B. L. R. 26.

Where, however, by the Articles of Association of a company, appointment of the time or place could only be made by a resolution passed at the meeting of the Board of Directors or by one signed by all the directors and there was no evidence of any such resolution having been passed or signed, it was held that under the circumstances the call was not validly made and the consequent forfeiture of shares for the non-payment thereof was invalid and *ultra vires*.¹²

Power of directors to make calls:—The power to make calls may, unless expressly reserved to the company in general meeting, be exercised by the directors.¹³ In making calls, however, the requirements and formalities stated in the articles must be strictly observed.¹⁴ The Courts will not interfere with the discretion of the directors to make a call and the burden of proving that the call is made *mala fide* by the directors in their own interests, and for their own benefit is on the shareholder seeking to restrain the directors from making the call.¹⁵

Liability to pay call:—When the shares in a company are not fully paid up, the balance remaining unpaid can be called up by the directors at any time unless this is forbidden by Articles. This liability cannot be avoided by a shareholder by transferring the shares standing in his name after a call has been made, the liability to pay the call in such a case being upon the transferor and not on the transferee.¹⁶

The liability for payment of call extends to the estate of a deceased member and accordingly if at the time of making the call the member is dead the call can be recovered out of his estate and the company can apply to have his estate administered by the Court.¹⁷ Likewise on a member becoming bankrupt the company may prove in bankruptcy, the uncalled liability on the shares but may also include in its proof an amount equal to the estimated amount of the future calls.¹⁸ It is, however, open to the company to agree with a shareholder to whom it owes money that the debts shall be settled at the future calls though the director and the managing agent of the company was, in view of his fiduciary position with respect to the company, held not entitled to act upon a resolution enabling him to set off the amount due to him from the company against what he owed in respect of his shares.¹⁹

12. *Bengal Electric Lamp Works Ltd.*, (1942) 12 Com. Cas. 238.

13. *Ambergate Railway Co. v. Mitchell*, (1849) Ry. & Can. Cas. 235.

14. *Chubwa Tea Co. v. Barry*, (1866) 15 L. T. 449.

15. *Odessa Tramways Co. v. Mendel*, 8 Ch. D. 245.

16. *Taylor, Phillips & Richard's Cases*, (1897) 1 Ch. 298.

17. *New Zealand Gold Extraction Co. v. Peacock*, (1894) 1 Q. B. D. 622.

18. *Memalion, In re*, (1390) 1 Ch. 173.

19. *K. C. Pandalai v. South Indian General Insurance Co., Ltd.*, (1941) 11 Com. Cas. 327.

Payment of calls in advance:—Section 49 (2) of the Act authorises the company to accept from any member who assents thereto, to whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up. Thus the company is expressly empowered by the Act to receive payment of calls in advance. Such power is, however, in the nature of a trust and must be exercised for the benefit of the company. Accordingly the company can receive payments in advance only if the directors are of the opinion that it is necessary to accept such payments and that the money so received can be advantageously used for the purposes of the company.²⁰ So in a case where the directors paid up any advance calls on their own shares and appropriated on the same day the amount so received in payment of their fees, the company being in embarrassed circumstances, it was held that the transaction was not *bona fide* and that the directors remain, liable on their shares.²¹

Interest on payment in advance of calls:—The company can, where there is a proper Article to this effect, pay interest on the amount received in advance of calls and such interest must be paid whether there are profits or not. If there are no profits or if such profits are insufficient then the company must pay out of the capital and there is nothing *ultra vires* in this respect.²²

Forum to enforce liability on calls:—A suit to enforce payment of arrears of call moneys is cognizable by a Court of Small Causes.²³ But a suit founded on the liability of a contributory is not cognizable by any Court of Small Causes sitting outside the Presidency Towns.²⁴

Power of company to arrange for different amounts being paid on shares:—Section 49 provides *inter alia* that a company if so authorised by its articles may do one or more of the following things, namely:—

(1) Make arrangement on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares;

(2) Pay dividend in proportion to the amount paid upon each share where a large amount is paid up on some shares than on the others.

In the absence of the first mentioned clause in the articles, a call cannot be made on some members only, while in the absence of the last

20. *Poole Jackson & Whyte's Case*, 9 Ch. D. 322.

21. *Sykes's Case*, 13 Eq. 255.

22. *Lock v. Queensland Investment Co.*, (1896) A. C. 461.

23. *People's Bank of Northern India v. Chanan-Ram*, A. I. R. 1938 Lah. 657.

24. S. 159 (2).

mentioned clause in the articles, the members are entitled to dividend in proportion to the nominal value of their shares and not in proportion to the amount actually paid thereon.²⁵

FORFEITURE OF SHARES

The power to forfeit shares is not inherent in a company. The directors can forfeit the shares only if they are so empowered under the articles of association of the company.²⁶ Where, however, there is no such power under the Articles, the Articles may be altered by a special resolution so as to provide the directors with the requisite power.²⁷

Exercise of power by directors:—The power to forfeit shares is in the nature of a trust to be exercised for the benefit of the company and consequently where it is exercised not for the benefit of the company but to enable any individual member to escape liability the transaction will be set aside.²⁸ In *Kanshiram v. Kishorechand*^{28a} Shadi Lal, J., summarised the law on the point as follows :

“A right to forfeit shares must, in order to be effectually exercised, be *perused* with the greatest exactness ; it must be exercised by the proper purpose i.e. by directors properly appointed and by the requisite number of them and in the proper manner and for the proper cause. The right must be exercised *bona fide* for the purpose for which it was conferred. The power to forfeit is a trust the execution of which will be narrowly scanned by the Court. It cannot, for example, be exercised surreptitiously, for the purpose of assisting him in getting rid of shares and retiring from the company is a fraud of the other shareholders. The Court will not sanction or recognise as valid a forfeiture made *mala-fide* for any such purpose.”

Accordingly where the shares were forfeited for relieving certain directors from the liability when the company was on the verge of bankruptcy the forfeiture was held to be invalid.²⁹ The power of forfeiture must be exercised by the directors of a company at a meeting duly convened and properly constituted.³⁰ Before, however, shares may be forfeited a notice as provided in the Articles to that effect must be given. It is only if a notice is served and the requisition therein contained is not complied with that the shares can be forfeited by the directors.³¹ Thus a valid call and default are conditions precedent to and necessary for a valid forfeiture.³² Where, there-

25. *Oakbark Oil Co. v. Crum*, (1882) 8 A. C. 65.

26. *Clark v. Hart*, 6 H. L. C. 633.

27. *Ellin v. Gold Reef of West Africa*, (1900) 1 Ch. 656.

28. *Wallcourt's Case*, (1899) W. N. 256 ; *Ex-parte Trading Co.*, 12 Ch. D. 191.

28a. 29 I.C. 567.

29. *Ex-parte Trading Co.*, (1879) 12 Ch. D. 191.

30. *In re Kinglet's Case*, L. R. 2 Ch. A. 328.

31. *Gokalchand v. Lahore Bank*, 28 I. C. 431.

32. *Bhagirathi Spg. & Weaving & Mfg. Co., Ltd. v. Balaji Bhawani Powar*, 32 B. L. R. 87.

fore, the directors had not, as provided by the articles, appointed the person and the place to whom and at which the call money was to be paid, either in their resolution making the call or in any subsequent resolution and the forfeiture was effected upon non-payment of calls aforesaid, it was held that no forfeiture of shares could be made in such a case as the call and notice given in respect thereof were invalid.³³ Similarly where at a meeting of the Board of Directors at which there was no proper quorum, a resolution was passed requiring the subscribers to the memorandum and articles of association to pay certain sums and on their inability to pay the said amount before the date fixed their shares were forfeited, it was held that the forfeiture was invalid, inasmuch as the resolution demanding payment was invalid for want of proper quorum and consequently the subscribers were not bound to make the payment.³⁴

Conditions precedent and even technicalities must strictly be observed before forfeiture:—The forfeiture of shares is, to all intents and purposes, the same thing as any other forfeiture which deprives a person of his property and, therefore, before any forfeiture could take place, all the conditions precedent must have been strictly and literally complied with. Thus a very little inaccuracy, e.g., inaccuracy in the notice of forfeiture in demanding the payment of interest from the date of the call instead of from the date appointed for the payment of the call is as fatal as the greatest.³⁵ Similarly the time for payment of the call cannot properly be fixed by a mere verbal direction by the directors to the secretary but must either be fixed by a formal resolution of the directors or such a direction must be given under the authority of the resolution of the directors.³⁶ The directors must in such a case act together as a Board and it would not be sufficient to procure the separate authority of a sufficient number of directors to constitute a quorum,³⁷ unless the Articles of the company provide for a resolution in writing signed by all the directors at a particular place in which case the resolution so signed would be sufficient.³⁸ Again it is the very essence of a call that the time and place for payment should be properly determined. Thus where the directors of a company passed a resolution for a call and the resolution fixed the sum per share to be called up but left the date at which it was to be paid, blank, and sometimes afterwards the resolution was passed fixing the date of payment and notices of the call were sent to the shareholders it was held that there was no proper call made until the second resolution fixing the date of

33. *Bengal Electric Lamp Works Ltd.*, A. I. R. (1942) Cal. 516.

34. *Vishwanath Prasad v. Holyland Cimentone*, (1939) 9 Com. Cas. 324.

35. *Johnson v. Lyttle Iron Agency*, (1877) 5 Ch. D. 687.

36. *Haycraft Gold Reduction & Mining Co.*, (1900) 2 Ch. D. 230.

37. *D. Arcy v. Tamar Kit Hill & Kellington Rly. Co.*, (1887) 2 Ex. 158.

38. (1942), 12 Com. Cas. 238 (244).

the payment was passed and that the second resolution did not in point of date, relate back to the first.³¹

The last-mentioned case has been followed in two subsequent Bombay Cases.⁴⁰ It was, however, distinguished in 35 B.L.R. 26, wherein it was held that it was not necessary to have a formal resolution of the Board of Directors, specifying the person to whom and the place where the call was to be made, since the form of notice showed that it was "by order of the Board" which raised a presumption that the matter was the subject of direction even in the absence of a formal resolution, and that even if it were necessary to have a formal resolution of the Board to that effect, it was a matter which was for the parties to waive." The last-mentioned decision (35 B.L.R. 26) was, however, dissented from in *Bengal Electric Works, Ltd.*,⁴¹ in which the previous decisions of the Bombay High Court were preferred and it was also held that there could be no waiver of rights in such a case as persons other than shareholders are interested in a forfeiture of shares, e.g., creditors. Thus in the matter of forfeiture of shares technicalities must be strictly observed and it is not as is sometime apt to be forgotten merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for the forfeiture. For, the forfeiture of the shares may result in the permanent reduction in the capital of a company.⁴²

Liability of defaulter after forfeiture:—On forfeiture of shares the defaulter ceases to be a member of the company and ceases also to be liable to pay any further money in the capacity as a shareholder.⁴³ Where Articles give a power to the company to sue for unpaid call, in respect of the forfeited shares after forfeiture and the shares are forfeited for non-payment of call, the shareholder is liable to pay the arrears of unpaid call as he becomes in such a case a debtor of the company in respect thereof.⁴⁴ The forfeiture affords a new cause of action to the company and the suit to enforce the payment would be governed by Article 115 of the Indian Limitation Act and the period of limitation begins to run in such a case from the date of the forfeiture. The forfeiture imposes in such a case a new obligation or a new debt. The shareholder thereafter ceases to be a member of the company and

39. In re Cowley & Co., (1900) 2 Ch. D. 280.

40. *Pioneer Elkhly Works Ltd. v. Amiruddin*, 50 Bom. 461; and *Bhagirathi Spinning, Wvg. & Mfg. Co. Ltd. v. Balaji Bhawani Power*, 54 Bom. 178.

41. (1942) 12 Com. Cas. 238.

42. Per Lord Romer in *Premila Devi v. People's Bank of Northern India Ltd.*, 1 L. R. (1939) Lah. 1 = A. I. R. (1939) P. O. 284.

43. *Indian Co-operative Navigation & Trading Co., Ltd. v. Padamsey Premji*, 36 B. L. R. 32.

44. *Ladies' Dress Assen. v. Pul Brook*, (1930) 2 Q. B. D. 376; and *Stocken's Case*, (1865) 3 C. A. 412.

and his liability to pay future calls is gone, and all that is left is his new liability to pay to company all moneys which at the date of forfeiture were presently payable by him to the company in respect of the shares.⁴⁵

The directors are not bound to sell the forfeited shares in order to reduce the liability of the person whose shares have been forfeited,⁴⁶ but payment of the uncalled capital by new allottee of the forfeited shares may enure for the benefit of the original shareholder who has forfeited his shares and would release him *pro tanto* in respect of the damages for which his breach of contract in failing to pay the call rendered him liable⁴⁷.

Interest on arrears of call after forfeiture :—A company is not entitled to interests on arrears of calls after forfeiture⁴⁸. In the last-mentioned case⁴⁹ their Lordships Bannerjee and King J. J. during the course of their judgement observed as follows :—

“There was no contract or claim upon which the claim for interest is based. In our opinion the Court of first instance was right in holding that no interest was claimable after the date of forfeiture and before suit, in the absence of any provision of law or contract. The Lower Appellate Court has held that under Article 14 Table A, interest was payable, but in our opinion interest that is payable under Article 14, is interest as shareholder and the defendant ceases to be shareholder of the company on the date when the share was forfeited.”

Cancellation of forfeiture :—The conditions for cancellation of forfeiture are: (i) that the articles of the company must confer on the directors power to annul forfeiture; (ii) and the directors can do only with the consent of the shareholder concerned, for if, once a valid forfeiture is effected it cannot be revoked unless, of course, the shareholder concerned himself consents to his name being replaced on the register of the shareholders.⁴⁹ But if the forfeiture itself is invalid, the directors can cancel the forfeiture even without the consent of the shareholder concerned. This was pointed out in *Bhagirathi Spinning, Weaving and Manufacturing Co. Ltd. v. Balaji Bhawani Power*⁵⁰ by Madgavkar, J., who observed during the course of his judgement as under :—

“A valid call and default are conditions precedent and necessary for a valid forfeiture. Where the calls have been valid and there has been default and the power of forfeiture has once been exercised by the director, it is not open to the directors of the company to rely upon the irregularity in their own procedure and that the consent of the contributory whose shares have been forfeited to revoke the forfeiture and replace him on the register as contributory. All the cases so far as I know including *Lark Worthy's Case* go no further than this. There is no case in which a call has been *at initio* invalid yet forfeiture upheld.”

45. *Maneklal Mansukhbhai v. Suryapur Mills Co. Ltd.*, 30 B. L. R. 549.

46. *Bishamber Nath v. Agra Electric Stores*, 54 All. 541.

47. *Re : Bolton Exp. North British Artificial Silk Ltd.*, (1830) 2 Ch. 48.

48. *Bishamber Nath v. Agra Electric Stores*, 54 All. 541.

49. *Lark Worthy's Case*, (1903) 1 Ch. 711.

50. 32 B. L. R. 87.

SURRENDER

Principle governing:—There is no reference in the Act to the surrender of shares; but these have been admitted by Courts upon the principle that they have practically the same effect as forfeiture, the main difference being that one is proceeding *in invitum* and the other is a proceeding taken with the assent of the shareholder who is unable to retain and pay future calls on the shares.⁵¹ A company may, therefore, under certain circumstances accept a surrender of shares if it is so authorised under its Articles.

Surrender of shares has been held to be valid only under circumstances which would have justified a forfeiture of shares.⁵² There may, however, be other cases where a surrender would be legitimate and each case must, therefore, be decided upon its own merit.⁵³

In *Trevor v. Whitworth*⁵⁴ Lord Herschel in dealing with the question of Surrender observed as follows:—

“SURRENDER no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale and open to the same objection. It if were accepted in a case where the company was in position to forfeit the shares, the transaction would seem to me to be perfectly valid. There may be other cases in which a Surrender would be legitimate.”

The principle, therefore, applicable to a case of surrender is that the surrender is good if it amounts to a forfeiture. It is not open to a shareholder to surrender at will his shares, especially when he has to meet future calls and it is not open to a company to accept surrender of shares unless the act of company can be brought within the rules relating to forfeiture of shares. (In re: *Mirza Ahmed Namazi*^{54a} the principle laid down in the above mentioned case was followed in another case of Lahore High Court⁵⁵ in which it was held that according to the general principles a surrender of shares involves a reduction of capital and as the capital of the company cannot be reduced but by leave of the Court, no surrender can be lawfully accepted except under the circumstances which would justify a forfeiture.

As pointed out in Palmer's Company Law (Page 79, 16th Ed.) “a company may in certain cases accept a surrender of shares, e.g., as a short cut to forfeiture; but if a company proposes to take back shares which are repudiated on the ground of misrepresentation, it seems doubtful whether the power to accept surrenders can safely be exercised, unless it is sanctioned by the Court, or unless the company is in position to forfeit the shares and *bona fide* arranges a surrender as the short cut to the same end. The validity of each case of surrender of shares must be decided on its own merits.

51. *Dronfield Silk Stone Coal Co.*, (1881) 17 Ch. D. 76.

52. *Ballarby v. Rawland & Marwood's Steam Ship Co.*, (1902) 2 Ch. 14.

53. In re: *Dronfield & Co.*, 17 Ch. D. 76.

54. 12 A. C. 409 (418).

54a. 89 I. C. 94

55. *Mangel Sen v. Indian Mercantile Bank Ltd.*, Amritsar, 107 I. C. 1928.

CHAPTER XI

ALTERATION OF SHARE CAPITAL

Share Capital—Meaning of:—Before dealing with the subject of the alteration of the share capital, it may be well to understand what is meant by “share capital” of the company. Such capital may have any one of the following meanings:—viz., (1). *Nominal or authorised capital*: It means the amount issued in the Memorandum of Association. Thus the nominal capital fixes the limit of the company for issuing the shares in which the capital is divided but it does not represent money in the till of the company for a nominal capital may be generally unpaid capital.¹

(2) *Subscribed capital*:—It is a part of the above nominal capital which has been actually issued and subscribed for.

(3) *Paid up capital*:—The amount actually paid up or credited as such on the shares issued.

Share capital is a term used in contradiction of what is sometimes called loan capital, i.e., the borrowed money which the company owes to its creditors. With regard to the share capital the company is not a debtor as it is not a debt of the company to its shareholders.²

Alteration of capital—how effected:—A company limited by shares may, in general meeting, make alteration in its capital in the following ways, provided it is so authorised by its Articles:—

- (i) It may increase its capital by issue of new shares;
- (ii) It may reduce its capital;
- (iii) It may consolidate and divide all or any of its capital into shares of larger amount than its existing shares;
- (iv) It may convert all or any of its paid up shares into stock, and reconvert that stock into paid up shares of any denomination;
- (v) It may sub-divide its shares;
- (vi) It may cancel its shares;
- (vii) It may enforce forfeiture of shares and under certain conditions, accept surrenders. This has been fully discussed above under headings “Forfeiture of shares” and “Surrender” on pages.....&.....of the Book respectively, to which reference may be made for detailed discussion.

We shall now discuss No. (i) to (vi) above separately.

1. *Dalton Time Lock Co. v. Dalton*, (1892) 66 L. T. 704.

2. *Lee v. Neuchetal Asphalt Co.*, (1889) 21 Ch. D. 28 C. A.

INCREASE OF CAPITAL

By issue of new shares:—A company having share capital may, if authorised by its articles, increase its capital by issue of new shares of such amount as it thinks expedient. Such increase must, however, be effected by the company in General Meeting. The mere resolution of Directors will not be sufficient for the purpose. Before the Amending Act of 1936 the alteration in the capital, as described above, with the exception of sub-division of shares, could be effected by the directors and it was only an alteration involving sub-division of shares which required to be made in general meeting. Under the present Act, however, the alteration aforesaid can only be made by a company in general meeting.

In case of the issue of new shares, such shares must, in the first instance, be offered to the existing members in proportion to the existing shares held by each member (irrespective of class) at the date of issue. Such offers must be made by a notice specifying the number of shares to which each member is entitled and fixing a time within which the offer, if not accepted, will be deemed to be declined. After the expiry of such time the directors may dispose of all the shares in such a manner as they may think most beneficial to the company. (Section 105-C).

The notice of the increase must also be given to the Registrar within 15 days of the passing of the resolution authorising the increase whereupon the Registrar shall record the same. Such notice shall include the particulars of the classes of shares affected and the conditions, if any, subject to which the new shares are to be issued. The penalty for a default in complying with the above requirements is a fine not exceeding fifty rupees for every day during which the default occurs. (Section 53).

A company not having a share capital may similarly increase the number of its members beyond the registered number and in so doing it must also file a notice of the increase of number within 15 days after the increase was resolved on or took place. In case of default the company and every officer knowingly and wilfully guilty of such default shall be likewise liable to the fine of fifty rupees per day. (S. 53).

If the Articles of the company do not authorise the increase of capital and the company wants such an increase, it must first change its Articles by a special resolution in accordance with the provisions of Section 20 of the Act. It may then increase its capital in the manner above mentioned.

Sometime when the affairs of a company are not in a flourishing condition, it may be tempted to issue new shares at a discount. Section 105-A of the Indian Companies Act recently added by the Amending Act of 1936, now validates the issue of shares at a discount under certain conditions. This has been already discussed fully under the heading "Issue of shares at a discount".

REDUCTION OF CAPITAL

Conditions precedent:—One of conditions precedent for the exercise of power so as to reduce the capital of the company is, that such power must be given by the articles. Where, however, no such power exists in the articles, the latter may be changed by a special resolution so as to confer such power. The articles must necessarily confer such power and it is not sufficient if the power is contained in the Memorandum.

Procedure:—Secondly, reduction of capital can only be effected by a special resolution of the company technically called "a resolution for reducing share capital". Such reduction must further be confirmed by the Court. The capital may be reduced by extinguishing or reducing the liability of any of the shares of the company in respect of share capital not paid up or by cancelling any paid up share capital which is lost or unrepresented by available sets or in other words by writing off lost capital; or by paying off any paid up share capital which is in excess of the wants of the company. Necessary alterations may be made in the memorandum by reducing the amount of its share capital and shares accordingly.

Thirdly, where a company has passed a resolution for reducing its share capital, it may apply by petition to the Court for an order confirming the reduction. (Section 56). It would thus be seen that the reduction of company's capital is forbidden unless it is carried out with the sanction of the Court. The creditors of a company have a right to rely on the capital being undiminished and any unauthorized reduction of the capital is illegal.⁴

The case, however, where the reduction of capital is allowable without the sanction of the Court are those of forfeiture, surrender and cancellation of shares which have not been taken or agreed to be taken by any person. The cases of forfeiture, surrender and cancellation of shares have already been discussed in this book.

Prohibition to buy its own shares by a company:—Section 54-A of the Act further prohibits a limited company from buying its own shares or the shares of a public company of which it is a subsidiary, unless the provisions for the reduction of the capital as contained in sections 55 to 66 are followed. It further prevents such a company other than a private company or a subsidiary company from giving, whether directly or indirectly, or whether by means of a loan, guarantee, provision for security or otherwise, any financial assistance for the purpose of enabling any person to purchase its own shares. Restriction last mentioned does not, however, apply to a company whose ordinary business is that of lending money in the ordinary course of the business. Again the restriction above mentioned would not affect the right of a company to redeem its redeemable preference shares issued under Section 105-B of the Act. Thus a company cannot purchase its own shares and such a purchase would be illegal and void even if a power to that effect were found

3. *Dexine Patent Packing Co.*, (1903) W. N. 82.

4. Per Lord Herschell in *Trevor v. Whitworth*, 12 A. C. 409.

in the Memorandum of Association of a company.⁵ In the last mentioned case Lord Macnaghton gave the reason for it thus:

“There are two conditions of the Memorandum—condition defining the objects of the company and the condition defining its capital—one or both of which would be affected by such a power.”

Again, the reasons for rule were very ably given by Jessel, M.R., in a leading case.⁶ When dealing with a company incorporated under the English Companies Act, 1862, which was formed for the purposes of carrying on the trades or businesses of Coal minings, the Memorandum of Association of which authorized the company to do all such things whatever which the company shall consider to be in any way connected with the trades, businesses or purposes aforesaid or any of them. The learned Judge, while holding that such a company could not purchase its own shares, in spite of the provisions in the Articles of Association that it could be made, observed as follows:—

- (1) “The purchase comes beyond the Memorandum of Association and was not authorised by it, because it does not confer a power to traffic any shares; (2) It would be void on general grounds because the purview of the whole Act of 1862 is utterly inconsistent with the notion that company could be registered as a member of itself; and (3) The transaction would be invalid by reason of its being a diminution of the capital of the company.”

In another case⁷ a similar view was taken which was later on accepted by the House of Lords in the leading case of *Trevor v. Whitworth*⁵ referred to above. The principle underlying all these cases is, as enunciated by the Master of Roll in *Dronfield Silk Stone Company*⁶ namely, that it is inconsistent with the essential nature of the company that it should become a member of itself as it cannot be registered as a shareholder to the effect of becoming debtor to itself for calls or being placed on the list of contributories in its own liquidation. In a recent case of Madras High Court⁸ it has, after an elaborate review of English authorities including those referred to above, been held that the legal incapacity of a limited company to purchase its own shares is not dependent upon the fact of the purchase being made either within the territorial limits of the place where the company was incorporated or outside its territorial limits but it is beyond the scope of its constitution and that if a purchase is made outside the place of its incorporation, a member who has sold the shares to the company cannot be removed from the Register of Members, the purchase being *ultra vires* of the company.

So strict is the rule as to the prohibition of the purchase by a company of its own shares that even where such shares are attached, at the instance

5 Per Lord Macnaghton in *Trevor v. Whitworth*, (1888) 12 A. C. 409.

6. In re : *Dronfield Silk Stone Coal Co.*, (1881) 17 Ch. D. 76.

7. *Hos v. International Financial Society*, (1875) 4 Ch. D. 327 (335).

8. *Sabaratnam v. Official Liquidator, Travancore National and Quilon Bank Ltd.*, (1943) 55 M. L. W. 653.

of the company, in execution of a money decree in its favour, and purchased by the company itself by bidding at the execution sale, the sale has been held to be a nullity.^{8a}

“Purchase” not including acquisition by subscription:—The word “purchase” does not, however, include the acquisition of shares by subscription. The difference between the issue of a share to a subscriber and the purchase of shares from an existing shareholder is the difference between the creation of transfer of *chose in action*. The two legal transactions of the creation of *chose in action* and the purchase of *chose in action* are quite different in conception and in result. Consequently subscription to shares with financial assistance of the company whose shares are thereby subscribed does not amount to a purchase of those shares and is not legally prohibited.⁹

Procedure to be adopted for reducing share capital:—The company must first of all decide upon the reduction by a special resolution which must state clearly how the reduction is to be effected and must show what is to be done in the way of reduction.¹⁰ The resolution aforesaid must thereafter be submitted to the Court for confirmation and for this purpose the company may apply by petition to the Court for an order confirming the reduction as contemplated by Section 56 of the Act.

Where the proposed reduction either involves diminution of liability in respect of unpaid share capital or the payment of any paid up share capital and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction. (Section 58 (1).) Where, however, the proposed reduction of capital does not involve diminution of assets and there has been no default by the company under the provisions of its debenture deed, a debenture holder or creditor and more particularly a secured creditor must make out a strong case before the Court will direct that he is entitled to object to the reduction. The Court will not exercise its discretion in favour of the debenture holder unless there is evidence that the assets are an insufficient security.¹¹

The Court shall settle a list of creditors so entitled to object and for that purpose shall ascertain the names of those creditors, the nature and amount of their debts or claims. The Court may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction. (Section 58 (2).) The Court cannot dispense with the procedure even if there is no creditor, the language of Section 58 (2) being imperative.¹²

8a. *Chota Nagpur Banking Association v. Rajib Nath*, A.I.R. 1947 Pat. 40.

9. *G. M. Holdings Ltd.*, In re : (1942) 12 Com. Cas. 254.

10. *Campbell's Case*, 9 Ch. A. 1.

11. *Wense Brewery Co.*, (1919) 1 Ch. 28.

12. *Hydraulic Power & Smelting Co.*, (1914) 2 Ch. 187.

If a creditor on the list of creditors whose debt or claim is not discharged or determined does not consent to the reduction, the Court may dispense with his consent if the company secures payment of his debt or claim by appropriating as the Court may direct, the full amount of the debt or claim, if the company admits the same or though not admitting it, is willing to provide for it; and where full amount of the debt is not admitted by the company, or the company is not willing to provide for it, or if the amount is contingent or unascertained, by appropriating such amount as the Court may fix, after the like enquiry and adjudication as if the company were being wound up by the Court. (Section 59). The creditors on the list whose debts are secured but not yet due and who have neither assented nor dissented to the reduction, must be taken to have assented thereto.¹³ The Court may require the company to publish, as the Court directs, the reason for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction (S. 65). The Court seldom acts under the above provision unless the loss has been very large and sudden.¹⁴

If the Court is satisfied that either the consent of every creditor entitled to object to the reduction has been obtained or his debt or claim has been discharged or has been determined or has been secured, it may make an order confirming the reduction on such terms and conditions as it may think fit.

If, however, any creditor entitled to object to the reduction of the share capital is, by reason of his ignorance of the proceeding for reduction or of their nature and effect with respect to his claim, not entered on the list of creditors and, after the reduction, the company is unable to pay the amount of his debt or claim, then (i) every person who was a member the company at the date of the registration of the order for the reduction and minute shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute, if the company had commenced to be wound up on the day before that registration; and (ii) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable as contributories and make, enforce calls and orders on them as if they were ordinary contributories in winding up. In such a case, however, the rights of contributories among themselves will not be affected. (S. 63). If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction or wilfully misrepresents the value and amount of the debt or claim of any creditor, or if any officer of the company abets any such concealment or

13. *Credit Foncier of England*, (1871) 11 Eq. 356.

14. *Tranum etc. Co.*, (1910) 2 Ch. 498.

misrepresentation aforesaid, every such officer is punishable with imprisonment which may extend to one year or with fine or with both. (S. 64).

After the order of the Court confirming the reduction has been made, a certified copy of the aforesaid order and of minute approved by the Court with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of the shares into which it is to be divided and the amount of each share, and the amount, if any, at the date of the registration deemed to be paid up upon each share, is to be filed with the Registrar who shall thereupon register the order in the minute (Sec. 61 (1).) On the registration and not before the resolution for reducing share capital as confirmed by the order so registered, shall take effect (Sec. 61 (2).) Notice of such registration shall be published in such manner as the court may direct. (Sec. 61 (3).) The Registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of the Act with respect to reduction of share capital have been complied with and that the share capital of the company is such as stated in the minute. (Section 61 (4).) even though it is discovered subsequently that there was no power in the company under its articles to reduce the capital¹⁵ or that the special resolution for reduction of capital was invalid.¹⁶

The minute when registered shall be deemed to be substituted for the corresponding part of the Memorandum of the company and shall be valid and alterable as if it had been originally contained therein and shall be embodied in every copy of the Memorandum issued after this registration. If the company makes default in compliance with the requirements aforesaid, it shall be liable to a fine not exceeding ten rupees for every copy in respect of which default is made and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty. (Section 62).

Section 57 of the Act further requires that the company in case of reduction in share capital involving the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid up share capital must add to its name the words "and reduced" from the date of resolution until such date as the Court may fix. In other cases where the reduction does not involve either the diminution of any liability or the payment as aforesaid, the words "and reduced" must be added on and from the date of the order of the Court confirming the reduction until such date as may be fixed by the Court, unless the Court thinks it expedient to dispense altogether with the addition of such words. The object of the addition of these words appears to be to give notice of the reduction of the capital to the outsiders dealing with the company. The use of words "and

15. *Walker v. Smith*, (1903) W. N. 82.

16. *Ladies Dress Assn. v. Pulbrook*, (1900) 2 Q. B. 376.

reduced' is really intended to serve a warning to the public that the capital of the company has been reduced.¹⁷

Section 66 of the Act makes provisions with regard to the reduction of share capital in a company in the case of a company having a share capital also applicable to a company limited by guarantee and registered after the commencement of the present Companies Act, 1923.

Jurisdiction of Court in effecting reduction of capital:—The jurisdiction of Court is not limited to cases mentioned in sub-section (a), (b), and (c) of Section 55 of the Indian Companies Act. The Court has jurisdiction to effect reduction in any other way approved by it but before granting its sanction to the reduction of capital, it must be satisfied that the reduction is not likely to work injuriously or inequitably.¹⁸

Again, it is not always essential or necessary for the Court to satisfy itself whether there has been a loss of capital. All that it need consider is whether the company has duly passed its special resolution for reduction. Where, however, the reduction is passed on the grounds that the capital is lost or unrepresented by available assets, it is always prudent for the Court to proceed on some evidence. If the person opposing the petition accepts the statement of the company that there has been loss of capital, the Court should act upon assumption that there is evidence of loss of capital.¹⁹ The principles on which a Court ought to act in a matter of this description, were laid down by Lord Macnaghton in (1907) A. C. 229 (1) at pages 238-239. The relevant passage in the judgment of His Lordship is this:—

"Such being the views expressed in this House without any dissent or qualification, I was surprised to hear it argued by the learned counsel for the appellants that the Court has no jurisdiction to entertain a petition for the reduction of capital unless it be proved that the capital which the company proposes to cancel is lost or unrepresented by available assets. No doubt some countenance for that proposition may be found even in cases which have occurred since the decision of this House in (1894) A. C. 399 (2). In (1900) 2 Ch. 846, where the scheme proposed was obviously unfair to the preference shareholders and the petition was very properly dismissed, there are some expressions in the judgment of the learned Judge who decided the case which, taken apart from the context, may appear to support that contention. The decision of Buckley, J., in (1902) 2 Ch. 845, goes even further. His language, if correctly reported, seems to imply that because the Act of 1877 specified certain cases and declared that the power conferred by the Act of 1867 "includes" those specified, it is to be inferred that in all other cases the jurisdiction of the Court is excluded. If that is the meaning of what the learned Judge said, with all respect I am unable to agree with his view. The condition that gives juris-

17. In re : *Pinkney etc. Steam Ship Co.*, (1892) 3 Ch. 126.

18. *Barrow Harnat Steel Co.*, (1900) 2 Ch. 846.

19. *Marwari Stores v. Bansi Shankar*, A. I. R. (1936) Cal. 327.

diction is not proof of loss of capital or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect."

His Lordship further observed as follows :—

"In the present case, creditors are not concerned at all. The reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The only question, therefore, to be considered are these :—(i) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company?; and (ii) Is the reduction fair and equitable as between the different classes of shareholders?"

Applying the principles of the above, it has been held by the Rangoon High Court,²⁰ that where a special resolution reducing the share-capital of a company was passed at a time when most of the paid-up capital had been lost or was not represented by available assets and the proposed reduction was designed to work justly and equitably and was shared by all the shareholders who were only of one class and did not involve the diminution of any liability in respect of unpaid capital or the payment, to any shareholder of any paid-up capital, there was nothing to prevent the Court from confirming such reduction. It was also pointed out in the case last mentioned that the power of the Court under S. 56 of the Act does not extend to the exercise of paternal care of the shareholders of a company so as to make it interfere in the internal management of a company acting within its powers. Where, therefore, the proposed reduction was fair and equitable to all concerned, confirmation thereof would not be withheld by the Court simply on account of the objectors having some fear for the future.

Discretion of Court and principles applicable to reduction :—A Court is not under an obligation to confirm any claim for reduction by whatever majority it may be sanctioned but has a discretion which it is bound to exercise in a proper case. In exercising that discretion, the Court ought to be very careful how it interferes with the *bona-fide* judgement of the businessmen on a matter of business in which they themselves are largely interested.²¹ The scheme of the Act is that as regards the shareholders and the public, they are protected by the publicity and the discretion which is vested in the Courts while so far as creditors are concerned their consent must be procured or else their claim must be satisfied and until the reduction is confirmed by Court, it does not take effect.²²

20. *Bengal Burma Steam Navigation Co. Ltd.*, In re : (1940) 10 Com. Cas. 1.

21. Per Stirling, L. J. In re : *Welsback Incandescent Co.*, (1904) 1 Ch. 87 (101).

22. Per Lord Macnaughton in *British & American Trustee Corporation v. Couper*, (1894) A. C. 399.

In a recent Peshawar Case²³ Mir Ahmad, J., reviewed the English authorities;²⁴ on reduction of capital and deduced therefrom the following principles applicable to such a case:—

- (1) That a company has the power to reduce its capital much more so if the power is conferred by the Articles of Association. (2) Subject to confirmation by the Court which is the safeguard of the minority, the question of reducing capital is a domestic one for the decision of the majority. (3) The company is to determine the extent, the mode and incidence of the reduction. (4) The company may reduce the share capital of all its shareholders *pro rata* or may reduce the shares of any individual shareholder or any class of shareholders wholly or in part. (5) That the Court has to see that interests of the minority have been protected and no unfairness has been shown to it. (6) That in doing so the Court should keep in view the consideration that the decision has been arrived at by businessmen who are fully cognizant of their necessities and are the best custodians of their interest and should therefore be slow to interfere.

Return of capital otherwise than by reduction of capital not permitted :—

A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. Any other distribution of money, whether called dividends or bonus or any other name can only be made by way dividing profits.²⁵

CONSOLIDATION, DIVISION AND CONVERSION OF SHARES

A company having a share capital may if so authorized by its Articles and in general meeting consolidate and divide all or any of its share capital into shares of larger amount than the existing shares or convert all or any of its paid-up shares into stock and reconvert that stock into paid-up shares of any denomination. Notice within 15 days of such consolidation and division, conversion or reconversion must be filed with the Registrar, specifying the shares consolidated and divided or converted or the stock or reconverted as the case may be. In case of default both the company and every officer who knowingly and wilfully may be party thereto shall be liable to a fine not exceeding fifty rupees per day during which the default continues. (Section 51).

SUB-DIVISION OF SHARES

A company may sub-divide its shares or any one of them into shares of smaller amount than is fixed by its memorandum provided that in the

23. *Khatler Electric Engineering Supply Co.*, 1938 Pesh.

24. *British and American Trustee and Finance Corporation v. John Couper*, (1894) A. C. 399. In re : *Credit Assurance & Guarantee Corporation Ltd.*, (1902) 2 Ch. 601. In re : *Welsback Incandescent Gas Light Co., Ltd.*, (1904) 1 Ch. 87; *Poole v. National Bank of China Ltd.*, (1907) A. C. 229. In re : *Louisian & Southern States Real Estate & Mortgage Co.*, (1909) 2 Ch. 552; *Neal v. City of Birmingham Tramways Co.*, (1910) 2 Ch. 464. In re : *De La Rue & Co. Ltd.*, (1911) 2 Ch. 361. In re : *Barrow Haematite Steel Co.*, (1888) 39 Ch. D. 582.

25. *Hill (R. A.) v. Permanent Trustee Co. of New South Wales*, (1930) A. C. 720.

sub-division the proportion between the amount paid and the amount unpaid on each reduced share remains the same as it was in the case of the shares from which the reduced share is derived. If the company exercises its power of sub-division, of shares under this clause, it must file with the Registrar notice of the same within 15 days of the exercise thereof. Such power must be exercised in general meeting. If, however, power to sub-divide shares is not contained in the Articles of company, such power may be provided by special resolution in accordance with Section 20 of the Act.

CANCELLATION OF SHARES

A company may cancel its shares which have not been taken up or agreed to be taken up by any person and diminish the amount of its share capital by the amount of shares so cancelled. Such cancellation shall not be deemed to be a reduction of the share capital within meaning of the Act. A company must also in this case file with the Registrar notice of the exercise of any power under this clause, within 15 days of the exercise thereof. (Section 50). Such power must, however, be exercised by the company in general meeting if the company is so authorised by its Articles. Where, however, such power is absent in the articles it may be conferred by a special resolution.

VARIATION OF THE SHAREHOLDERS' RIGHTS

Rights attached to different classes—how varied :—The rights attached to a class of shares may be varied in accordance with the provision made in that behalf by the Memorandum and Articles of Association of a company. The usual provision is that they may be altered subject to the consent of any specified proportion of the whole of the issued shares of that class or with the sanction of the resolution passed at a separate class meeting of the holders of those shares. Section 66A provides that, if in exercise of a power referred to above, the rights attached to any class of shares in the company are at any time varied the dissenting minority holding not less, in the aggregate, 10 per cent of the issued shares of that class may apply to the Court to have the variation cancelled within 14 days from the date of which the consent as aforesaid was given or the resolution of that particular class of shareholders was passed. On such application being made, the Court shall hear the applicants and any other persons who may apply to the Court to be heard and appear to the Court to be interested in the application. The Court may if it is satisfied that the variation would, under the circumstances, unfairly prejudice the shareholders of the class represented by the application disallow the variation and shall, if not so satisfied, confirm the variation. Decision of the Court on any such shall be final (Section 66A (1) to (4).) The company is required to forward within 15 days after the service to the company of order made in such application, a copy of the order to the Registrar and, in case of default, the company and every officer of the company responsible for the default shall be liable to a fine not exceeding fifty rupees.

Application for cancellation of Variation—Right to apply :—The right to apply under Section 66-A is given to the holder or holders of 10 per cent of the issued shares of the class whose rights are to be varied. Such holders must not have consented to the proposed variation or voted in favour of a resolution for the proposed variation. That is made quite plain by Sub-section (1) of Section 66-A referred to above. Sub-section (2) of that section is imperative and requires that the application under the Section must be made within 14 days after the date on which the consent was given or the resolution was passed. The sub-section enables the application to be made either by a qualified shareholder that is to say a shareholder who has not consented to the variation or voted in favour of the resolution for variation — or qualified shareholders who hold the prescribed percentage of shares, or by a qualified shareholder who, when he makes the application, has the written authority of other qualified shareholders whose holdings together with his own amount in the aggregate to 10 per cent of the issued shares of the class of the shares, the rights of which are to be varied. The sub-section does not enable an application to be made by a shareholder who, when he makes the application, does not himself hold a prescribed percentage, and has not then the written authority to act as agent for other shareholders whose holdings, aggregated with his own, amount to the prescribed percentage. Accordingly a petition under section 66A by a shareholder who had neither himself the prescribed percentage nor the written authority of the shareholders as described above, was not allowed to remain on the file while the shareholder tried to whip up a sufficient number of stock holders to support him. It was also held that whatever the motive which prompted the petitioner, the proceedings must fail as they hamper the legitimate business activities of the company against whom it was presented and that the petition was an abuse of the process of Court and should at the earliest possible moment be removed from the file of the Court.²⁶

Separate class meeting of the holders of a class of shares:—The presence at a separate meeting of the holders of one class of shares, the shareholders of other class not voting, however, either by show of hand or by poll, does not invalidate the meeting as a separate class meeting for passing a resolution.²⁷ In the last mentioned case an extraordinary resolution relating to the reduction of the capital of a company by cancellation of half the amount of each of 21,736 and 564 deferred shares of 10 shillings each and by conversion and consolidation of each 4 deferred shares into one ordinary share carrying full dividend right was submitted by the directors for the purpose of simplifying and strengthening the company's structure. It was approved by more than the statutory majority at the extraordinary general meeting and by more than the majority prescribed by the Articles of Association of the com-

26. *Suburban & Provincial Stores Ltd., In re.* (1949) Com. Cas 180 (Ch. D.)

27. *Karruth v. Imperial Chemical Industries*, (1937) A. C. 707.

pany at each of the separate class meetings of the ordinary and deferred shareholders. The Board of Directors had sent to all the shareholders a circular which contained detailed information regarding the scheme, but which made no reference to the comparative holdings of the directors in the ordinary and deferred shares, were, however, present in the hall during the holdings of the class meeting of the deferred shareholders but there was no evidence that any shareholder other than the deferred shareholders either took part in the conduct of or voted at that meeting. It was held that as the Articles of Association of the company empowered it to reduce its share capital in the way specifically mentioned therein or otherwise as they may seem expedient, the company was entitled to reduce its capital in any way authorised by the Act; that the meeting of the deferred shareholders was properly convened, the objection which might have been raised to the presence of holders of shares of another class was deemed to have been waived under the circumstances and the extraordinary resolution was duly passed by the requisite majority. It was also held that the circular issued to the shareholders disclosed sufficient information to enable them to judge the fairness and propriety of the scheme and that the scheme for reduction and re-arrangement of the capital did not operate unfairly in relation to the holders of the deferred shares.

CHAPTER XII

BORROWING POWERS & REGISTRATION OF CHARGES

BORROWING POWERS

No implied power to borrow :—The general rule as to the power of a company to borrow is that there is no implied power to borrow and the authority for the purpose must be found in the Memorandum and unless the objects are specified in the Memorandum including the power to borrow, a company cannot usually borrow or incur loans.¹

Points to be seen when borrowing power is to be exercised :—By whatever way this power of borrowing is exercised by a company—be it by an ordinary unsecured loan, by making and discounting bills or promissory Notes, by a mortgage of the Company's property or by the issue of debentures, it is always necessary to see firstly whether the company has the requisite borrowing power; secondly whether the directors have authority to exercise that power without a resolution of the company; thirdly whether there is any limit on the amount which may be raised and if so whether that limit is reached; and fourthly whether the company or its directors have power to secure the repayment of money borrowed by a mortgage or charge on all or any part of the assets of the company.^{1-a} For the answer to all these questions, the Memorandum and Articles of Association must be carefully consulted.

Power presumed in case of trading and commercial concerns :—In the case of a trading or commercial concern and more particularly in the case of banking concern, such a power even if the Memorandum and Articles are entirely silent, will, however, be presumed as being properly incidental to the course and conduct of business for its proper purpose.²

In case of non-trading companies, the power to borrow must, however, be expressed in the Memorandum and Articles.³ In the last mentioned case, Cotton, L. J. made the following pertinent observation at pages 488-489 :—

“It was said that every corporation unless restricted by act of incorporation, has the same power as an individual to enter into contracts, including that of borrowing money. In our opinion this contention cannot be maintained. The power of corporation established for certain specified purposes must depend upon all of those powers and except so far as it has expressed power given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge the duties or fulfil the purposes for which it was constituted..... A trading corporation stands, as regards an implied power of borrowing, in a very different position.”

1. *Blackburn & District etc. Societies v. Cunliffe Brook & Co.*, 22 Ch. D 61

1-a *Gorel Browne Handbook on Joint Stock companies*, 97th Edn; P. 251.

2. *Banking of Australia v. Breillat*, 6 Moo. P.O. 195 a case of Banking company, *Australian Auxiliary Steam Glipper Company v Mounsey*; (1858) 27 L. J. Ch 729; a case of shipping company *Bryan v. Metropolitan Salon Omnibus*, (1858) 3 De. G. & J. 123; a case of Omnibus company; *Jackson v. Rainford Coal Co.*, (1896) 2 Ch. 340 a case of colliery company; *General Auction Estate Co v. Smith*, (1891) 3 Ch. 432; *Young v David Payne Co.*, (1904) 2 Ch. 608 (612) cases of trading Cos..

3. *Queen v. Charles Reid*, 5 Q. B. D. 483.

Borrowing without such power—effect :—If at the time of incurring a debt there is no [power in the company to borrow, the transaction would be *ultra vires* the company,⁴ and it [cannot be validated by a subsequent acquisition of power to borrow.⁵ Accordingly any borrowing when the company has no such powers or [where its Memorandum [fixes a limit to the borrowing powers, any borrowing in excess of such limit is *ultra vires* the company. In such a case, the contract is void and the securities become inoperative. So where the managing agents of a company borrowed money on behalf of the company [which could not then commence any business inasmuch as it has not obtained commencement certificate under Section 103 of the Indian Companies Act, and could not, therefore, exercise any borrowing powers, and the unauthorized borrowing was neither *bonafide* [nor necessary for the company, it was held that even if the money was utilised for the company, the company could not be saddled with the liabilities thereof.⁶ Such an *ultra vires* contract cannot even be ratified and if a company ratifies it without knowledge of the fact that it was a contract entered into *ultra vires*, it will not be bound by the contract.⁷

Ultra vires borrowing :—In case of an *ultra vires* borrowing, the lender has no right to sue the company in respect of the loan. Accordingly, it has been held that if a company is not authorised to borrow any money and if money in fact is borrowed, no claim can be maintained by the lender against the company on the footing either of debt or of money had and received.⁸ But he has certain rights in respect of the moneys received by the company. He has, for instance, right to intervene before the money has been actually spent by the company, to follow his money and to obtain an injunction restraining the company from parting with it. If, however, the money has been spent away by the company, in paying off just debts owing to the creditors of the company, he may be entitled to stand in the place of the creditors and subrogate to their rights.⁹ Such subrogation will not, however, give him the same priority that the creditor who is paid off had to any securities for their debts held by such creditors.¹⁰ He has in some cases his right against the directors of the company personally for breach by them of their implied warranty of authority when their acts amount to implied representation of facts.¹¹

The Directors are liable in such a case even if it is proved that they did not know that they were exceeding their powers.¹² But the directors would not be liable if their

4. *Troup's Case*, (1860) 29 Beav. 353.
5. *Ex-parte Watson*, 21 Q. B. D. 301; *Bottom Gate Industrial Corpn. Society*, in re: 65 L.T. 712.
6. *Equity Insurance Co. v. Dinshaw & Co.* A. I. R. (1940) Oudh 202.
7. *Taluk Board, Chidamabaram v. Karadesesba Iyengar*, A. I. R. 1938 Mad. 226.
8. *Sinclair v. Brougham*, (1914) A. C. 398.
9. *Blackman Building Society v. Conliffe Brooks*, 22 Ch. D. 61.
10. *Wrexham Mold & Kollab's Quay Rail Co.* (1899) 1 Ch. 440 (C. A.)
11. *Fair Bank v. Humphreys*, 18 Q. B. D. 54.
12. *Weeks v. Propert*, (1878) 8 C. P. 427.

ast amounts only to a misrepresentation of law.¹³ Where, however, the directors guarantee the repayment of loans taken by the company, but the loan is secured by an *ultra vires* arrangement, they are not relieved from liability as guarantors by reason of the claim being unenforceable against the company.¹⁴

Intra vires but irregular borrowing:—Where the directors borrow in excess of their powers but the borrowing is *intra vires* the company, the borrowing is nevertheless irregular and securities are inoperative for where the borrowing powers of directors are limited to a certain amount, they cannot borrow beyond that amount so as to bind the company.¹⁵ The company may, however, in such a case be estopped from alleging its invalidity or the shareholders may elect to ratify the act of the Directors.¹⁶

In the leading case referred to above the fact showed that the directors could borrow on bond such sum as from time to time by general resolution of the company, they might be authorised, and a resolution having been passed, the lender was not called upon to make any other enquiries but was held entitled to rely on what appeared to be done on the face of the document (deed of settlement) as legitimately done. The judgement in the case, however, makes clear the distinction between the case where the directors are permitted to borrow on certain conditions and those conditions were fulfilled, the lender would be entitled to act on the footing that the necessary steps were taken and the way in which the authority is given is a matter of the internal management of the company. On the other hand when there is an express prohibition to borrow and the certain limit contained in the Articles itself, the lender cannot rely on the principle of the above mentioned case but has to satisfy himself that in accordance with all the terms of the Articles, the prohibition does not stand in the way of the directors borrowing the money. This distinction is made clear and accepted by the decision in *Irvine v. Union Bank of Australia*¹⁷ referred to above.

Borrowing *intra vires* the Company but *ultra vires* the directors—effect of:—It has been held in a series of cases that where the borrowing by a company itself is not *ultra vires* but the directors of the company have no power to borrow, a person lending money to the company can enforce payment, if it can be shown that the money had been *bona fide* applied for the purposes of the company. Where, therefore, the director having no borrowing powers being pressed for money by their contractors obtained for him on credit £ 2,000 at a banker's upon their guarantee and the contractor afterwards agreed to lend the plant etc., to the company, on receiving £ 600 and being indemnified against the Banker's claim; and subsequently to this the secretary of the company, with the sanction of the directors, borrowed £ 500 in his own name for the company, which was applied in paying the bankers, the company having had a benefit of the plant etc., it was held that the secretary could recover the amount from the company with interest^{17a}. The principle of the last mentioned case was accepted and followed in *Hoare's Case*,¹⁸ wherein it was held that money borrowed for the company and *bona fide* applied for its benefit could be recovered from the company although the directors had

13. *Rashdall v. Ford*, 2 Eq. 750.

14. *Garrad v. James*, (1925) Ch. 616.

15. *Fountainaine v. Carmarthen Railway Co.*, (1868) 5 Eq. 316.

16. *Royal British Bank v. Turquand*, (1856) 6 El. Bl. 327.

17. (1877) 2 A. C. 366 P. C.

17a. *Troup's Case*, (1860) 29 Beave 353.

18. (1861) 30 Beave 225.

no borrowing powers.¹⁹ Ruling is another clear authority for the proposition that the money actually received by the company and used for its business could be recovered by the claimants. In another case²⁰, by the deed of settlement of a joint stock company, power was given to meeting, consisting of 2/3 in number and value of the shareholders to authorise the directors to borrow money upon debentures; and at a meeting of the shareholders holding less than 2/3 of the shares, it was resolved that the director should be authorised to borrow money on debentures. The director accordingly borrowed on debentures diverse sums of money, which were applied in discharge of debts and liabilities of the company. The debentures debts regularly appeared in the report of the directors which were confirmed at the annual general meeting of the shareholders and interest was regularly paid, with the consent of the shareholders, until the winding up of the company, for a period of 2 years, it was held that though the debentures were clearly improperly issued yet as the money had been raised and applied for the benefit of the company, and the shareholders had acquiesced for two years, it was too late to dispute the validity, notwithstanding the fact that the holders of the debentures themselves were present at the meeting of the shareholders which passed the resolution and were, therefore, conscious of the irregularity of the meeting.

In a recent Bombay case, it has also been held on the review of the above mentioned English authorities, that where the director had borrowed money for the benefit of the company which had been used for the legitimate business of the company, the company could not repudiate its liability to pay the money even though the borrowing was not authorised by the Company.²¹

In the last mentioned case, Kania, J., observed as follows:—

“According to the general principles of law, when an agent borrows money, for a principal, without the authority of the principal, but if the principal takes the benefit of the money so borrowed, or when the money so borrowed has gone into the coffers of the principal, the law implies the promise to repay. The lender has not advanced the money as a gift, but has given them as a loan, and the principal having received the benefit of the money, the law implies a promise to repay. This view is supported by the decision in *Reid v. Righy & Co.*²² There appears to be nothing in law which makes this principle inapplicable to the case of a joint stock company when the borrowing power of the company itself is unlimited. The position in my opinion would be that the principal (the company) through its agents (the directors or the managing agents) had borrowed money which the principal had not authorised the agent to borrow. However, the money having been borrowed and used for the benefit of the principal, either in paying its debts or for its legitimate business, I do not think the company can repudiate its liability to repay on the ground that the agents had no authority from the company to borrow. In my opinion when these facts are established, a claim on the footing of the money had and received, would be maintainable. The decision in *Sinclair v. Brougham* is clearly based on fundamental facts that the society was prohibited by the statute from borrowing any money and therefore, borrowing by the company, i.e., the principal, itself would be *ultra vires*.”

19. *British & American Telegraph Co. v. Albion Bank*, (1872) 7 E. X. 119.

20. In re: *Magdalena Steam Navigation Co.*, (1880) 29 L. J. (N. S.) Ch. 687.

21. *T. R. Pratt v. E. I. Sason & Co.*, A. I. R. (1936) Bom. 62.

22. (1894) 2 Q. B. D. 40; *Bannatyne v. MacIver*, (1906) 1 K. B. 103.

Similarly in another case where the only reference to borrowing power contained in the Articles of Association of the company was a provision that the directors might borrow money, there being no express power of delegation by the directors, though by various powers of attorney the company appointed agents, not directors, who were empowered *inter alia* to borrow money on the security of company's goods, it was held that the fact that the Articles of Association empowered only the directors to borrow which it could exercise to properly authorised agent, and that in the absence of anything in the memorandum or articles of association, restricting the company's power to borrow through agents, borrowing by such agents was within their ostensible authority, the precise limits of agents' powers to borrow being a matter of internal management into which a lender would not be required to enquire. The company was, therefore, held bound even by excessive borrowing of the appointed agents so long as those borrowings were within the ostensible authorities of the agents.²³ It was, however, held in another case that where the Secretary of a company had no power to borrow money on its behalf, the company could not be held liable to repay money even though paid for its benefit at the request of its Secretary, where such request had not been made or confirmed by a properly constituted meeting of directors and the company did not know of or acquiesce in the payment being made for its benefit.²⁴

Extent of authorized borrowing :—If a company has power to borrow, it can create mortgages or charges to secure the repayment of loan.²⁵ So where the memorandum contains the necessary authority to borrow, the company may charge or mortgage all its property, of whatever nature, including future property, such as book debts not yet due,²⁶ and its uncalled capital²⁷ but not its reserve capital.²⁸

Fixed and floating charges :—Debentures can be either naked debentures or mortgage debentures. Mortgage debenture again can be divided into two classes, viz., debentures which are secured by what is known as a fixed charge; and debentures which are secured by what is known as floating charge. The difference between the two classes is this, viz., in the first case the charge is fixed on definite property as in the case of an ordinary mortgage subject to the charge; in the other cases the charge floats and does not attach until certain contingencies happen; and the company can generally deal with the property in the usual course of business by way of sale, mortgages etc.²⁹

Distinction between fixed and floating charge :—A specific or fixed charge is one that without more fastens on the ascertained and definite property capable of being ascertained and defined; a floating charge on the other hand is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is entitled to effect until some event occurs or some act is done which causes it to settle and fasten on

23. *Mercantile Bank of India v Chartered Bank of India, Australia & China*, (1897) 1 All. E. R. 231.

24. *Re Cledan Trust Ltd.*, (1938) Ch. 660 affirmed by Court of Appeal and in (1938) 4 All. E. R. 518 O. A.

25. *Patent Fife Co.*, (1871) 6 Ch. 88.

26. *Illingworth v. Houldsworth*, (1904) A. C. 353

27. *Newton v. Aughton Australian etc. Co.*, (1895) A. C. 244.

28. *Bartlett v. Mayfair Property Co.*, (1898) 2 Ch. 28.

29. *Sircar & Sen on Indian Companies Act*, page 316.

the subject of the charge within its reach and grasp.^{29a} The last mentioned event occurs either (a) when a receiver is appointed or (b) when there is a winding up of the company or (c) the company stops business. When any of these contingencies happens the floating charge crystallizes.³⁰

The consequences of a charge becoming fixed by reason of winding up on the appointment of a receiver or on the fulfilment of some conditions in the deed upon the happening of which the charge is to be converted into specific mortgage with the result that it attaches itself to the assets are that the debenture holders become entitled to all the rights of a specific mortgagee.³¹ Thus the essential feature of floating charge is that it remains floating or dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes.³² It is, however, a present charge not a future one, though it does not specifically affect any item until some event happens which causes it to become fixed.³³ The charge crystallizes or becomes fixed on the happening of the event mentioned in the debentures as thus upon which the debenture holders or trustees may take possession or appoint a receiver and upon possession duly taken or the receiver appointed and also if the company goes into liquidation even though the provision of the debenture only stipulates that the principal shall become liable on the company's going into liquidation otherwise than for the purpose of reconstruction.³⁴

Principal tests to ascertain the nature of charge:— In another case³⁵ the principal tests as to whether the charge is a floating one or not, were laid down by their Lordships of the Privy Council as follows :

“Is it a charge upon all or certain class of assets present or future ? Would the assets charged in the ordinary course of business be changed from time to time ? Has the company power until such step is taken by the charges to carry on the business of the company in the ordinary way?”

Where, therefore, the assets of a company are liable to constant fluctuation and must change from time to time in the ordinary course of business, and when the charge is created no restraint of any kind whatever is placed in the conduct of the business of the company and the charge crystallises into a fixed security only upon some act or intervention on the part of the charges, the charge so created is a floating one.³⁶

Charge held to be floating one:—In a recent case³⁷ an agreement whereby a certain amount was deposited with the company by the managing agents of the company as security for the fulfilment of their obligations purported to create a second charge on the machinery and other goods of the company to the extent of the security deposited, i.e., a charge which would fasten on to the property that might exist when the time arrives for the charge to be enforced ; it was held that the charge created

29a. Per Lord Macnaghten in *Illingworth v. Houldsworth* (1904) A. C. 355 (358).

30. In re : *Florence Land etc. Co.*, 10 Ch. D. 510.

31. In re : *Panama Co.*, 5 Ch. A. 318.

32. *Government Stock Etc. Co. v. Manila Rly. Co.*, (1897) A. C. 81 (86).

33. *Evan v. Rivel Granite Quarries*, (1910) 2 K. B. 979 (999).

34. *Player v. Crompton & Co.*, (1914) 1 Ch. 954.

35. *Mercantile Bank v. Bengal National Bank Ltd.*, (1931) Com. Cas. 159.

36. *Indias Film Corporation Ltd.*, In re : (1939) 9 Com. Cas. 166 Sind.

37. *Maheswari Brothers v. Official Liquidator, Indra Sugar Works Ltd.*, (1942) 12 Com. Cas. 76.

thereby was a floating one. The observations of Lord Atton in *National P. & U. Bank Charnley*³⁸ are worthy of note in this connection. His Lordship observed in the course of the judgement referred to above as follows :

"I think there can be no doubt that where in a transaction for value both parties evince an intention that property existing or future shall be made available as security for the payment of debt and that the creditors shall have a present right to the fact made available, there is a charge even though the present legal right which is contemplated can only be enforced at some future date and though the creditor gets no legal right of property either absolute or special or any legal right to possession, but only gets the right to have the security made available by an order of the Court."

Main characteristic of a floating charge :—(1) It is a charge on a class of company's assets present and future ; (2) that class is one which, in the ordinary course of business of the company, is changing from time to time ; (3) and it is generally in the ordinary way in that class of assets till some step is taken by and on behalf of these interested in the charge³⁹ While the company is a going concern the mere happening of such an event is not enough to crystallize the charge⁴⁰ but the charge or the debenture holder must, on the happening of such event, take steps with a view to realize his security e.g., get a receiver appointed to enforce security.

Again it is of the essence of the floating charge that it remains dormant until the undertaking charged ceased to be a going concern or until the person in whose favour the charge is created intervenes.⁴¹

A floating charge can be created on part of assets of a company.⁴² Such a charge on the 'undertaking' of the company has also been held to be good.⁴³ In the last mentioned case, Giffard, L. J., made the following important observations in this connection :—

"I take the object and the meaning of the debenture to be this, that the word 'undertaking' necessarily infers that the company will go on, and that a debenture holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal and that principal was unpaid. I think the meaning and object of the security was this, that the company might go on during the interval, and, furthermore that during the interval, debenture holder would not be entitled to any account of mesne profits or of any dealing with the property of the company in the ordinary course of carrying on their business. I see no difficulty or inconvenience in giving that effect to this instrument. But the moment the company comes to be wound up and the property has to be realized, that moment the right of these parties beyond all questions attach. My opinion is this that, even if the company has not stopped, the debenture holders might have filed a bill to realise their security. I hold that under these debentures they may have a charge upon all the property of the company, past and future by the term 'undertaking' that they stand in position superior to that of the general creditors who can touch nothing until they are paid."

38. (1924) 1 K. B. 481.

39. Per Romer, L. J., in *Holdsworth v. Yorkshire Woolcombers' Assn.*, (1908) 2 Ch. 284.

40. *Edward Nelson & Co., v. Faber*, (1903) 2 K. B. 376.

41. *Birchand v. John Bros.*, A. I. R. 1934 All. 161.

42. *Imperial Bank of India, v. Bengal National Bank*, A. I. R. 1931 P. C. 245.

43. *Panama etc. Co., in re*, (1870) 5 Ch. A. 318.

A floating charge is not a future security it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets plus a license to the mortgagor to dispose of them in the course of his business, but it is a floating mortgage applying the every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security.⁴⁴

The right of a company to create a floating charge is incident to its right to carry on business, and consequently no such charge can be created after the company had actually stopped business or after the debenture holder had intervened under the powers reserved to him to stop the business by obtaining the appointment of a receiver or petitioning for the winding up of the company.⁴⁵ Similarly a floating charge on the undertaking or property of the company created within 3 months of the commencement of the winding shall be invalid, except as to the amount of the cash paid at the time of or subsequent to the creation of such charge and interest thereon at the rate of 5% per annum, unless it can be proved that the company immediately after the creation of the charge was solvent. (S. 233). Thus if a floating charge is created within 3 months of the date of the commencement of the winding up when the company is in solvent circumstances, and the consideration therefor is partly past debts and partly fresh advances, the security so far as the past debts are concerned would be treated as invalid, while the security, so far as the fresh advances are concerned, would be valid to that extent with interest at 5% per annum.⁴⁶

Postponement of floating charge:—The difficulty sometime arises when the company has been allowed to go on carrying on business and creating charges after the happening of any of events which determines its right to carry on business. In cases of this kind the Courts have been disposed to hold, at any rate, when the language of deed admits of it, that the right to carry on business is not determined automatically by the happening of one of the events indicated but continues until the debenture holder intervenes to show his desire that it should cease as by applying for a receiver. Accordingly in a contest between right created by certain charges in favour of the certain persons and the rights of debenture holders in a case where the debenture deed, after charging all the assets of the company by way of floating charge and providing that notwithstanding such charge the company should have power to carry on business and deal with the assets of the company until default should have been made for 6 calendar months in payment of the principal, provided that from and after the happening of such default the liberty and authority hereinbefore given (i.e., to carry on business) would forthwith cease and determine and the charge created by the debenture would become immediately enforceable it was held that the debenture holders had no right of priority over the charge holders as the debenture holders had not intervened, in spite of default aforesaid to crystallize their charge.^{46a}

44. *Evans v. Rival Granite Quarries*, (1910) 2 K. B. 979 per Lord Buckley, L. J.; & *Bank of Baroda v. Shivdasani*, 50 Bom. 547; A. I. R. 1926 Bom. 427.

45. *Nallaperumal Pillai v. Krishna Aiyangar*, 30 I. C. 286 (287).

46. *Raymann Christie & Lily v. Company*, (1917) 1 Ch. 283.

46a. *Belasubramania Iyer & Iyer v. Kandasami Pillay*, 32 Indian Cas. 91.

The creation of a floating charge, therefore, still leaves the company free to make specific mortgages of its property so as to postpone the floating charge to the fixed mortgages thus created.⁴⁷ for, as pointed out by Jessel, M. R. in re: *Colonial Trust Corporation, Ex-parte Bradshaw*,⁴⁸ it would be a monstrous thing to hold that the floating security prevented the making of specific charges or specific alienations of property, because it would destroy the very object for which the money was borrowed, namely, the carrying on the business of the company. Similarly the company may sell whole of its undertakings if it is so authorised by its Memorandum, notwithstanding a floating charge.⁴⁹

A clause is usually inserted in the debentures to the effect that the company shall not have power to mortgage the property in priority to or *pari passu* with the charge created by the debentures. This is done to avoid the risk of the debenture holders being postponed to subsequent specific charges by way of fixed mortgages or otherwise, created by the company on all or part of its property. Such a clause is effective as between the company and the debenture holders, but even in such a case the floating charge will be defeated by a subsequent sale or a mortgage without notice of the prior floating charge secured by the debentures.⁵⁰ In the last mentioned case⁵¹ the debentures creating a floating charge contained a provision that the company would not create any prior charge, but the manager, forgetting this, deposited the title-deeds with the Bank as security. It was held that the Bank had priority over the floating charge in respect of its debt due from the company on the equitable mortgage, notwithstanding the fact that it held some of the debentures as a security from another customer, an event not affecting the Bank with notice of the condition of the debentures in their dealings with the company. Similarly, it has been held that a *bona fide* purchaser for a legal title to any property charged with debentures will give priority over the debenture holder and will not be affected with constructive notice of such restrictive clause, even though he had notice of the existence of the debentures.⁵²

The Amending Act of 1936 has added sub-section (2) to Section 109 of the Indian Companies Act. According to the aforesaid sub-section, if a mortgage or charge on any property of the company has been registered, as contemplated by Section 109 (1), it would operate as notice to any person acquiring, subsequent to the registration the property in respect of which the mortgage or charge is effected or any part thereof, as from the date of its registration. Such registration will no doubt affect the world with notice of the floating charge but not with notice of any special restrictive provisions contained in such charge, whereby the company is precluded from dealing with its property.⁵³

Again a floating charge may become postponed to the claim of other persons when they act before the debenture holders can take any steps to enforce their security; e.g., a garnisher who gets garnishee order made absolute, a landlord who distrains from rent, a decree-holder who attaches goods of the company and gets them sold.⁵⁴ If,

47. *Gort. Stock Investment etc. Co. v. Manila Railway Co.*, (1895) 2 Ch. 551.

48. 15 Ch. D. 465 (472).

49. *Borax, C.*, in re, (1901) 1 Ch. 326.

50. *Ceoveney v. Persse*, (1910) 1 I.R. 194; a case of sale.

51. *Valletort-Steam Laundry*, (1903) 2 Ch. 654; a case of mortgage.

52. *English & Scottish etc. Investment Co. v. Banton*, (1892) 2 Q. B. 1700.

53. *Standard Rotary Machine Co.*, (1906) 95 L. T. 829.

54. *Davey & Co. v. Williamson & Sons*, (1898) 2 Q. B. 194.

however, the debenture holders intervene before a garnisher obtains his money, or before a decree-holder gets the attached goods sold, they will be preferred.⁵⁵ Similarly the lien of a solicitor may attach and obtain precedence over the floating charge.⁵⁶ Section 230 (2) (b) of the Indian Companies Act gives certain preferential payment enumerated in sub-section (1) of that Section priority over claims of the debenture holders under any floating charge created by the company. Where, however, the debenture holders are secured both by floating charge and fixed charge, such priority would apply only in respect of all assets subject to the floating charge.⁵⁷

Again the last mentioned sub-section S. 230 (2) (b) only operates if at the moment of the winding up there is still floating a charge created by the company, and it only gives the preferential creditors a priority over the claims of the debenture holders in any property which, in that moment of time, is comprised in or subject to that charge. Where, however, the charge ceased to float and became crystallized owing to the appointment of receiver in the debenture holders' action, and subsequently compulsory winding up order was made, the preference creditors whose debts were incurred after the appointment of the receiver would not be entitled to priority over the debenture holders' claim in respect of their assets over which the receiver had been appointed.⁵⁸

According to S. 129 (1), the preferential payments referred to above shall have priority over claims of the debenture holders secured by a floating charge when either a receiver is appointed on behalf of the latter or possession is taken by them or on their behalf of any property comprised in or subject to the charge, when the company is not in the course of being wound up. Such payments in the event referred to above, are payable forthwith out of the assets coming into the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures. (Section 129 (1)).

DEBENTURES

Debenture—What it means :—One of the most common modes of borrowing by a company is on debentures. A debenture means a document which either creates the debt or acknowledges it and any document which fulfils either of these conditions is a debenture.⁵⁹ This definition has been later on held to be possibly a too wide one.⁶⁰

An acknowledgment of indebtedness fulfils the primary qualification of a debenture and it does not matter by what name the company calls the document.⁶¹ The debentures are bonds given usually under the seal of the company specifying the fact that the company is liable to pay the amount mentioned therein with interest the amounts of such.

55. *Norton v. Yates*, (1906) 1 K. B. 112.

56. *Branton v. Electrical Engg. Corpn.*, (1892) 1 Ch. 434.

57. *Lloyds Bank Ltd. v. The Company*, (1929) 1 Ch. 498.

58. *Griffen Hatch*, In re : (1941) 11 Com. Cas. 268.

59. Per Chitty, J., in *Levy v. Abercorris Slate Co.*, (1888) Ch. D. 264.

60. Per North, J., in *Topham v. Greenside Co.*, (1886) 87 Ch. D. 281 (291).

61. *Lemon v. Austin Friars Investment Trust*, (1926) 1 Ch. 1.

bond being usually secured upon some property of the company. The term 'signifies a security' for money called on the face of it a debenture and providing for the payment of a specified sum at a fixed date and at a specified rate of interest. Usually it gives a charge by way of security and in most cases it is one of the series of like debentures. (Palmer's Company Law, XVI Edition, page 280). In the absence of special provision in the Articles, a debenture does not essentially require seal of the company and even if the Article requires it to be sealed, unsealed debentures may be good as an agreement.⁶²

The term may be used to describe an instrument which is not called on the face of it debenture, e.g., a railway mortgage or bond.⁶³ A document may be nonetheless a debenture even if it does not provide for repayment at any fixed date but only in the event of winding up or some other contingency, or if it does not provide for personal liability of the company, or if it does not contain any charge or if it does not contain any provision for payment of interest.⁶⁴ What is called a debenture may be a mere promise to pay or covenant to pay under seal or a mortgage or charge under the seal of the company.⁶⁵

As observed by Chitty, L. J., in *Admon v. Balania Furnace Co.*⁶⁶, "the term 'debenture' itself imports a debt—an acknowledgment of a debt—and speaking of numerous and various forms of instruments which have been called debentures without anybody being able to say the term is incorrectly used. I find that, generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security, so that there are debentures which are secured and debentures which are not secured."

The Indian Companies Act does not contain any definition of the term. It simply says debenture includes debenture stock. (Section 2 (1) (4).) A debenture stock is merely a borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has certificate entitling him to a certain sum being a portion of one large loan. (See Lindley on Company Law, page 346.) The difference between the holder of a debenture and the holder of debenture stock of a company is this that while the former is entitled to a separate debt (either secured or unsecured) which is payable by the company to him in certain specified events or after the expiration of a specified term of years, the latter is entitled to a share of debt (either secured or unsecured) which is usually made payable to certain specified events or after the expiration of the specified term of years. The debenture stock holder's charge is almost invariably secured by a trust or covering deed, whereby the company covenants to pay to debenture stock holders the interest and in certain events the principal money due to them respectively in respect of their debenture stock. Such trust deed usually secures the debenture stock by vesting certain specific property in the trustees thereof and creating a legal mortgage thereon and by creating a floating charge on the undertaking and remaining assets of the company.⁶⁷

62. *Fire Proof Doors Ltd.*, (1916) 2 Ch. 142.

63. *Gardener v. London Chatham & Dover Railway Co.*, 2 Ch. A. 201.

64. *Lemon v. Austin Friar Investment Trust*, (1926) Ch. 1.

65. *British India Steam Navigation Co. v. Commissioner of Inland Revenue*, 7 Q. B. D. 166 (1929).

66. 36 Ch. D. 215 (219)

67. Simonson on Debentures and Debenture Stock on page 6.

Kinds of debentures :—The principal kinds of debentures are (i) debentures payable to bearer ; (ii) debentures payable to bearer capable of being registered i.e., with powers for bearer to have them placed on the register ; (iii) debentures payable to registered holders ; (iv) debentures payable to registered holder with interest coupons payable to bearer ; and (v) perpetual debentures.

In all these cases the debentures are usually issued in series and are secured by the mortgage or charge on some property of the company, whether by trust deed or in the debentures themselves or in both ways. It is, however, not essentially necessary that there should always be a charge nor is it necessary that there should be a series of debentures.⁶⁸

When such debentures are accompanied by a charge they are called mortgage debentures while here there is no charge they are called naked debentures. The most usual kinds of debentures are debentures payable to the bearer and the debentures payable to the registered holder.

(i) **Debentures payable to the bearer :—**Debentures may be so framed as to be payable to the bearer;⁶⁹ and it has been held that the custom to treat debentures to bearer as negotiable by delivery is sufficiently proved to take effect under the law merchants and judicial notice is taken of such custom without express evidence.⁷⁰ Thus such debentures may become negotiable instrument with the usual incident of being transferable by delivery. A person who acquires *bona fide* and for valuable consideration a bearer debenture, in due course, would get a good title thereto notwithstanding any defect in the title of transferor, from whom he acquires it. Again notice of transfer need not be given to the company nor is stamp duty payable on transfer, and it enables the bearer to sue the company in his own name if and when necessary. A debenture of this kind has an interest coupon attached to it. Such interest is payable to the bearer of coupon, i.e., to any person who presents it on or after a certain date. The delivery of the debenture and the interest coupon gives the good discharge to the company.

(ii) **Debentures payable to bearer capable of being registered :—**The advantage of these convertible type of debentures is that it can be got registered by those who wish to avoid a risk incidental to possession of the bearer debenture while those who prefer to have a negotiable instrument can have it so.

(iii) **Debentures payable to registered holder :—**The title of the holder of this class of debenture is recorded in the book of the company. This would avoid the risk incidental to the possession of the instrument to the bearer. Such debentures are, however, non-negotiable and are only payable to the registered holder thereof who is the only person recognised by the company as entitled thereto.

(iv) **Debentures payable to registered holder with interest coupons :—**This type of debentures is entitled to provide for interest coupons payable to bearer. Though they are not themselves negotiable, the coupons for interest attached to them are nevertheless negotiable.

68. *Robson v. Smith*, (1895) 2 Ch. 112.

69. *Johnston Foreign Patent Co.*, (1904) 2 Ch. 284.

70. *Beechams Land Exploration Co. v. Landon Trading Bank*, (1898) 2 Q. B. D. 658.

(v) **Perpetual debentures**:—The issue of perpetual debentures has been legalised by section 126 of the Indian Companies Act and no debenture can now be treated as invalid only by reason of its being made irredeemable only on a happening or contingency however remote, or on the expiration of the period however long. (Section 126). Thus debenture may be for a fixed term of years or repayable on notice or irredeemable.⁷¹ A debenture would be treated as irredeemable where either there is no period fixed for a repayment or where the repayment is made conditional on the happening of an event which may not happen for an indefinite period.⁷² It may also be, if the context so requires, not liable to be called in.

DEBENTURE TRUST DEED

Scope of the debenture trust deed:—Debentures and debenture stock are usually secured by a trust deed whereby the property of the company securing the issue of the debentures or debenture stock as the case may be, is conveyed to the trustees who hold it subject to the provisions contained in the Trust deed regulating the respective rights of the company and the debenture holders. Such a deed usually contains a legal mortgage of the freehold and leasehold properties specified therein and a general charge by way of floating security on the rest of the assets and undertaking of the company.

Advantages of such deed:—The advantages of a mortgage trust deed are that it vests in the trustees, the property mortgaged who would look after the property and the rights and interests of the debenture holders. Such trustees can act upon an emergency and take immediate steps, in case of default by the company with respect to any conditions in the deed, on behalf of the debenture holders. They may, if so empowered by the terms of the deed, enforce the security by sale of the property comprised therein without the aid of the Court. A legal estate is vested in the Trustees, so that a subsequent legal mortgagee is prevented from getting priority.

Usual provisions in such deed:—After declaring the charge, the trust-deed usually specifies the various events on the happening whereof the security will become enforceable including the event of the company committing any breach of the covenants, contained in the deed. It should also contain a provision as to the trustees' remuneration and the mode of payment thereof. It often empowers the trustee in certain specified events, to sell the mortgaged property at their discretion or at the request of a specified proportion of the debenture holders, without the aid of the Court, and to apply the net proceeds thereof in paying off the debentures. It also contains provision for the appointment of the receiver in certain cases and other miscellaneous matters, e.g., meeting of the debenture holders, mode of notice of such meetings or other matters to the debenture holders, protection, repairs and insurance of the mortgaged property etc.

The trust-deed referred to above must be recorded in the company's register of mortgages and charges maintained under Section 112 of the Act, and when it creates a series of debentures entitling the holders *pari passu* the particulars required under Section 110 must be filed with the Registrar within 21 days after the execution of the deed,

71. *Willey v. Joseph Stock & Co.*, (1909) 26 T. L. R. 41.

72. *City of London Brewery Co. v. Commissioner of Inland Revenue per Rigby, J.*, (1899)

1 Q. B. 121.

together with the deed or copy thereof verified in the prescribed manner. No separate particulars need, however, be filed under Section 109 of the Act in such a case, where such particulars are filed as specified above.

ISSUE OF DEBENTURES

Meaning of term 'issue' :—The 'term Issue' is a popular term meaning a group or batch of two or more debentures in precisely the same form and conferring on the holders precisely the same rights. (Simonson on Debentures and Debentures Stocks).

Debentures are issued in much the same way as shares. The application for allotment of debentures are similar to those in the case of shares. A prospectus offering the debentures may be and is generally issued by the company, but if any question arises as to the terms of the debentures, no reference can, as a rule, be made to such prospectus and the provision of the debentures alone must be considered.⁷³

A public company cannot exercise any borrowing powers until it becomes entitled to commence business. (Section 103). It cannot, therefore, till then issue debentures.

Restrictions on issue of debentures by public company :—Again, a public company which does not issue a prospectus on or with reference to its formation, cannot issue debentures unless it issues and files with the Registrar a statement in lieu of prospectus before the first allotment of the debentures. (Section 98 (1)).

Series of debentures—necessary condition in :—The power to issue debentures comes to an end only on the commencement of the winding up. Where debentures are issued creating a charge it should be expressly declared that the charge created by all the debentures of the series is to the rank equally and without priority one over another, for if this is omitted each debenture would create a charge ranking in priority to all others issued subsequently, but postponed all issued before it.⁷⁴ Successive series of debentures rank in order of their issue and each series is postponed to that before it while it takes priority over all following it. Where, therefore, the charge in the debentures of the first series was expressed to be subject to any mortgages which may, thereafter, affect the property and a second issue was made with a floating charge and a declaration that "all the debentures of this and the first series shall rank *pari passu*", it was held that the second issue was postponed to the first.⁷⁵

Issue of debentures for existing debts :—Again, the debentures may be issued in respect of an existing debt,⁷⁶ and may also be deposited to secure an existing debt.⁷⁷ Similarly debentures stock can be mortgaged or deposited as security for a loan by the company which issues it or by an ordinary holder.⁷⁸

Issue of debentures at discount :—Again, debentures may be issued at a discount and the principle that the share cannot be issued at a discount does not apply to

73. *Tewkesbury Gas Co.*, (1911) 2 Ch. 279.

74. *Gairside v. Silk Stone Co.*, (1882) 21 Ch. D. 762.

75. *Marshall v. Benjamin Cope & Sons*, (1914) 1 Ch. 800.

76. *Howard v. Patent Ivory Co.*, (1888) 38 Ch. D. 469.

77. *Re: Patent File Co.*, (1871) 4 Ch. 28.

78. *Samuel v. Jarrah Timber Corp.*, (1904) A. C. 330.

them, the reason being that they do not form capital of the company. But a provision that debentures issued at discount may be exchanged for fully paid up shares at par, is illegal and void.⁷⁹ Commission may also be paid in respect of debentures. The amount or rate percent of the commission, discount or allowance paid must, however, be included in the particulars required to be filed for registration with the Registrar under Section 109/110 of the Act.

An invalid issue of debentures—what may be:—According to Section 233 of the Indian Companies Act, a floating charge on the undertaking or property of the company created within 3 months of the commencement of the winding up shall be invalid, except as to the amount of cash paid at the time of or subsequent to the creation of such charge and interest thereon at the rate of 5% per annum, unless it can be proved that the company immediately after the creation of the charge was solvent. Accordingly debentures creating a floating charge, if issued within three months of the commencement of the winding up in contravention of the above provision, would be invalid to the extent specified therein, but where such debentures are issued in pursuance of previous agreement to secure the loans advanced at the time of such agreement and thereafter they would not be invalid under the aforesaid Section (i.e., Sec. 233).⁸⁰ If, however, the lender intentionally delays the issue of debentures, the payment made in anticipation of the creating of the floating charge will not be treated as payment in cash at the time of such creation.⁸¹ In considering whether there has been a payment in cash within the meaning of S. 233 aforesaid, it is always the question of substance that must be regarded and not the question of form.⁸² In the last mentioned case, Romer, L.J., made the following important observations on the point:—

“There are, of course, certain considerations for the issue of a debenture which plainly do not amount to payments in cash. Where, for instance, an existing creditor of a company takes a debenture from the company to secure the amount of his debt on the terms that he shall not immediately press for payment of his debt, or where he takes a debenture for the amount of his debt on the terms that the debt itself is to be extinguished, obviously no cash passes from the debenture holder, the lender to the company. If in such a case the lender goes through the form of drawing a cheque in favour of the company for the amount of his debt, on the terms that the company shall forthwith itself hand to him in exchange a cheque for the same amount, in one sense it might be said there has been a payment in cash. But in such a case there has not been a payment in cash if one looks at the substance and not at the form, and in considering whether there has been a payment of cash within the meaning of Section 266, it is always the question of substance that must be regarded, and not the question of form.”

Accordingly, where the directors of a company who had guaranteed the company's overdraft, on being pressed by the Bank for repayment of the overdraft, instead of making the payment aforesaid, in which case they would have been unsecured creditors of the company for that amount, went through the form of handing a cheque or

79. *Moseley v. Coffy Fontin Mines*, (1903) 2 Ch. 108.

80. *In re: F. & E. Stanton Ltd.*, (1929) 1 Ch. 180 and *In re: Columbian Fire Proofing Co.*, (1910) 1 Ch. 756.

81. *As above.*

82. *Mathew Ellis Ltd.*, *in re.*, (1939) 102 L. J. Ch. 65.

cheques for the amount aforesaid to the company, on the terms that the company should hand these cheques over to the Bank, and issued debentures to the directors for the same, it was held that there had not in fact been any cash paid to the company. The directors had not in fact parted with any cash to the company, and never intended to part with any cash, and all that happened was that the directors had, using the company as a conduit pipe, paid cash to the Bank and the debentures were consequently held invalidated.⁸³

It has also been held in a recent case that where debentures are issued by a company in insolvent circumstances within six months (3 months under Indian Law) of its winding up, the test for deciding the validity of such issue is, whether the transaction is to be regarded as one intended *bona fide* for the benefit of the company or whether it is intended merely to provide certain moneys, not for the benefit of the company but for the benefit of certain creditors of the company, where the effect of the issue of the debentures is to procure the payment to certain of the creditors, in preference to the other creditors of the company, of the sums due to them, the floating charge created by the debentures is wholly invalid.⁸⁴

Re-issue of debentures :—Section 127 of the Act empowers the company to keep the debentures alive for the purposes of re-issue and to re-issue the debentures which have been previously issued and redeemed, either by re-issuing the same debentures or by issuing other debentures in their place, unless the Articles of the company or the conditions of the previous issue expressly otherwise provide or unless the debentures were redeemed in pursuance of an obligation on the company to do so. The holder of such debentures shall have and shall be deemed always to have had the same rights and priorities as if the debentures had not previously been issued. The Section aforesaid, merely deals with the power of the company to re-issue debentures in certain cases. It does not, however, limit its powers to re-issue them on any terms it likes, e.g., to re-issue them at a discount etc.⁸⁵

Where with the object of keeping alive debentures for the purposes of re-issue, they are transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of the aforesaid Section. (Section 127 (2).)

Where a company has deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures will not be treated as having been extinguished by reason only of the account having ceased to be in debt. (Section 127 (3).) In case of re-issue of debentures or issue of new debentures in place of redeemed ones, the same stamp duty will have to be paid as would have been payable if the debentures were being issued for the first time. (Section 127 (4).) But a person who without notice or negligence takes a debenture which appears on the face of it to be duly stamped but which in fact was not duly stamped, is protected. Such person may give the debenture in evidence in any proceedings for enforcing a security, without payment of the stamp duty or any penalty in respect thereof. The company would in such a case be, however, liable to pay the proper stamp duty and the penalty (Proviso to Section 127 (4).)

83. *Orlean Motor Company*, in re, (1911) 80 L. J. Ch. 477.

84. *Destone Fabric Ltd.*, (1941) All E. R. 545 (Ch. D.).

85. *Regent Canal Iron Works Co.*, 3 Ch. D. 43.

The power to issue debentures in place of any debenture paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or securities for the same, would not be affected by Section 127 aforesaid. (Section 127 (5) (b)).

Thus the rights which a company had, apart from Section 127, to issue debentures in the events aforesaid, have been left unaffected. The power to re-issue debentures given under Section 127 aforesaid does not, however, give the company power to issue debentures which are different in their terms than the original ones.⁸⁶ In the last mentioned case, Morton, J., adopted the following reasoning :—

‘ The Sub-Section (corresponding to Section 127 (1) of Indian Act) gives power to re-issue the debentures in either of the two different ways—by re-issuing the same debentures or by issuing other debentures in their place. For my part, I cannot see that the power to re-issue debentures can extend to give the company power to issue debentures which are not the same in their terms as the original debentures.....In my view, a power to ‘re-issue’ debentures, even if the re-issue can be carried out in two alternative ways is merely a power to revive the original transaction and not a power to enter into a new and different transaction.”

Specific performance of contract to subscribe for debentures :—A contract with a cheque to take up or pay for any debentures of the company may be enforced by decree for specific performance. (Section 128). Where, however, a company forfeited certain debentures on failure of the purchaser to pay the instalments due thereon, it was held that no specific performance could be obtained.⁸⁷

Transfer of debentures :—Debentures are transferred in much the same way as shares in a company. Sub-section (3) of Section 34 of the Act provides that there must, in such a case, be a proper instrument of transfer duly stamped and executed by the transferor and the transferee accompanied by a scrip before it is lawful for the company to register a transfer of debentures of the company and Section 108 makes it obligatory for every company to have ready for delivery the certificates of debentures or of debenture stock transferred within three months after the registration thereof, unless the conditions of the issue of the debentures or debenture stock otherwise provide. The debentures payable to bearer may, however, be transferred by delivery only.

Enforcement of debentures and remedies of the debenture holders :—The holders of debentures payable on or after a certain date can demand payment on or after such date, notwithstanding that the debentures contain a stipulation to the effect that the debentures selected by ballot only will be so paid and after 6 months' notice by the holders.⁸⁸ In the last mentioned event or in case of any other default in the payment of the principle or interest secured by the mortgaged debentures, the debenture holders shall have all the remedies which the mortgagees would have in like circumstances. Thus they may bring an action against the company to obtain payment and may apply for the sale of the mortgaged property.⁸⁹ They may also proceed by way of foreclosure and

86. *Antofagasta etc. Co. Trust Deed*, (1933) Ch. 732 : 1939 All E. R. 461 Ch.

87. *Kuala Pli Rubber Estate v. Mowleary*, 111 L. T. 1072.

88. *Tewkesbury Gas Co. etc. v. The Company*, (1911) 2 Ch. 279.

89. *Clery v. Brasil Rly. Co.*, (1915) W. N. 178.

apply to the court for foreclosure of the company's rights to redeem the debenture.⁹⁰ provided if all the debenture holders of the company are parties to such an application, ⁹¹ They may also themselves appoint a receiver if the conditions of the debentures give them such powers or may ask the trustees to enter upon and take possession of the mortgaged property and sell the same if such power is reserved by the trust deed. The receiver so appointed by the debenture holders is really an agent of the company and as such incurs no personal liability.⁹² They may also present petitions for winding up of the company and the mere fact that a debenture holder has obtained the appointment of a receiver does not preclude him from applying for a winding up order,⁹³ and the holder of a mortgaged debenture applying for winding up order need not give up his security.⁹⁴ He may, at his discretion, either value his security and prove for the balance of his debt or give up the security and prove for the whole debt. He cannot, however, prove for the interest accruing due after the winding up. If he owes a debt to the company, he cannot set it off against the liability of the company, the rule being that a person claiming a share of the fund must pay up everything he owes to the fund.⁹⁵ It is, however, necessary in each case to consult the debentures and the debenture trust deed, if any, in the first instance, in order to ascertain whether there has been a default as contemplated therein and what remedies are available without the assistance of the Court or otherwise. The strict compliance with all the conditions of the debentures or the debenture trust deed, as the case may be, is absolutely essential. Thus, for instance, where a debenture holder is required to give notice to the company prior to taking any action, the condition is not broken unless such notice has been given.⁹⁶

Again if payment is stipulated to be made at a certain time and place, the condition is not broken unless the demand is made by the debenture holder at that place.⁹⁷ Again if the consent of the majority of the debenture holders is required under the deed, before any action can be commenced, a debenture holder who has not obtained such consent cannot obtain the appointment of a Receiver.⁹⁸

Appointment of Receiver :—Receiver may be appointed by (1) a particular person if the power of appointing a receiver is vested in such a person by the debentures or the debenture trust deed and the power is exercised in interest of all the debenture holders ; ⁹⁹ or (2) he may be appointed by debenture holders if the deed contains a provision to that effect and the power is exercised by the debenture holders in accordance with the aforesaid provision i.e., on the happening of a contingency mentioned in the deed, ¹⁰⁰ or (3) an application may be made to the Court in a debenture holder's

90. *Oldrey v. Union Works*, (1895) W. N. 77.

91. *Elias v. Continental Oxygen Co.*, (1997) 1 Ch. 511.

92. *Owen v. Crank*, (1895) 1 Q. B. 265.

93. *Borough of Portsmouth Tramways*, (1892) 2 Ch. 362.

94. *Moor v. Anglo-Italian Bank*, (1879) 10 Ch. D. 681.

95. *Brown & Gregory*, in re, (1904) 1 Ch. 627.

96. *Roger & Co. v. British etc. Assn.*, 68 L. J. Q. B. 14.

97. *Thorn v. City Rice Mills*, (1889) 40 Ch. D. 357.

98. *Pethybridge v. Unibifocal Co.*, (1918) W. N. 278.

99. *Stuart v. Maskelyne Typewriter Co.*, (1898) 1 Ch. 128.

100. *Henry Pound & Sons*, in re, 42 Ch. D. 402.

action for the appointment of a receiver. The appointment of the receiver in the last mentioned case is discretionary with the Court and will be exercised whenever the security is in jeopardy, even though neither principal nor interest may be in arrears.¹⁰¹ But in the case of an appointment of the receiver outside the Court, on the strength of the provision contained in the deed, the Court has no power to interfere.¹⁰²

Receiver appointed by Court :—In case of a receiver appointed by the Court, the property in respect of which such receiver is appointed is treated in the custody of the Court so that any interference with it amounts to a contempt of Court, though this is not so in the case of a receiver appointed with the intervention of the Court.¹⁰³ Again the receiver appointed by the Court is the Agent, neither of the debenture holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duty prescribed by the order appointing him ; duties which may extend to continuation and management of the business. The company remains in existence though it has lost its title to control its assets and affairs with the result that some of its contracts such as those in which it stands to imply in the relation of a master and servant, being of a personal nature may, in certain cases, be determined by the mere change in possession of the company may be liable for a breach. But it does not follow that all the contracts of the company are determined even, to put the highest when a mortgagee acting under a power in his mortgage, assumes control of the business of the mortgagor.¹⁰⁴ Again the appointment of a receiver, if it is of a permanent character, operates as a discharge of the servants of the company though such appointment by debenture holders may not have that effect,¹⁰⁵ and it converts a floating into a fixed one.¹⁰⁶

A receiver appointed by the Court will be personally responsible to the creditors of the company whilst he will be indemnified out of the estate.¹⁰⁷

Application of assets in the debenture holder's action :—In a debenture holder's action where there is a deficiency, the assets must be applied in the following order :—

(1) Costs of realization; (2) Costs including remuneration of receiver ; (3) Costs, charges and expenses of debenture trust deed including the trustees' remuneration; (4) plaintiff's costs of action; (5) preferential creditors and (6) debenture holders.¹⁰⁸

Accordingly in a debenture holder's action where the master's order provided for the taxation of plaintiff's costs and also for those of the trustees of deed for securing the debenture held by the plaintiff but did not provide for the order in which the costs were to be paid, it was held that the trustees' costs as also their remuneration should be paid in priority to the plaintiff's costs, as it would be wrong to deprive the trustees of the

101. *Me Mohan v. North Kent Iron Works*, (1891) 2 Ch. 148 & *Campbell v. London Pressed Hinge Co.*, (1905) 1 Ch 576

102. Per Cotton, L. J. in *Henry Pound & Sons*, 42 Ch. D. 402 (419).

103. *Bayley v. Went*, 51 L. T. 764

104. *Owen v. Crank*, (1895) 1 Q. B. 265. *Woods Application*, in re, (1941) 11 Com. Cas. 274.

105. *Reid v. Explosive Co. Ltd.*, (1887) 19 Q. B. D. 264.

106. *Govt. Stock etc., Co. v. Manila Bly.*, (1897) A. C. 81.

107. Per Rigby, L. J. in *Owen v. Crank*, (1895) 1 Q. B. 265.

108. *Re : Glynoorweg Colliery Co. etc. v. The Company*, (1926) Ch. 951.

right which they had to be paid their remuneration out of the funds in Court in priority to the costs of the plaintiff.¹⁰⁹

Registration of appointment of receiver :—It is the duty of every person who obtains an order for the appointment of the receiver of the property of a company, from the Court, or who being entitled to do so under a deed, appoints a receiver under any power contained in such deed, to file within 15 days from the date of the order or appointment, under the power contained in the deed, as the case may be, the notice of the fact with the Registrar who shall on payment of prescribed fee, enter the fact in the register of mortgages and charges. If the person aforesaid makes a default in complying with the above requirements, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues. (S. 118).

The object of the aforesaid section is to enable the outsiders dealing with the company over whose property the receiver has been appointed to obtain knowledge of the fact of such appointment by referring to the register of mortgages and charges in the office of the Registrar of the Joint Stock Companies.

The above mentioned appointment of a receiver under any power contained in any deed refers to a provision usually found in the debenture trust deed for the appointment of a receiver of the company upon happening of certain eventualities mentioned therein.

Every receiver of the property of the company appointed under the power contained in any deed, and who has taken possession of such property, is required to file with the Registrar once in every year, an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates and also to file with the Registrar on ceasing to act as receiver, notice to that effect and the Registrar must enter the notice in the register of mortgages and charges. (Section 119 (1).)

In case of the appointment of receiver of the property of a company, every invoice, order for goods or business letters issued by or on behalf of the company, or the receiver of the company, as the case may be, shall contain the statement that the receiver has been appointed. (Section 119 (2).) If default is made in complying with the requirements aforesaid, the company, and every director, manager, managing agent, secretary or other officers of the company and every receiver who knowingly and wilfully authorises or permits the default, shall be liable to a fine not exceeding two hundred rupees.

REGISTRATION OF CHARGES

Requirements of S. 109 :—Section 109 requires the following mortgages and charges on the company's property or undertaking to be registered, and unless the prescribed particulars of the mortgages or charges, together with the instrument, if any, by which they are created or copies thereof are filed with the Registrar for registration within 21 days after the date of its creation, the security, in so far as it is thereby conferred on the company's property, shall be void against the liquidator and any creditor of the company. The mortgages and charges requiring registration are as follows :—

- (a). A mortgage or charge for the purpose of securing an issue of debentures ;
- (b) a mortgage or charge on the uncalled share capital of the company ; (c) a mortgage

109. *City Housing Trust Ltd., in re, Colb v. The Company*, (1943) 13 Com. Cas. 25.

or charge on any immovable property, wherever situated or in interest thereon; (d) a mortgage or charge on any book debts of the company; (e) a mortgage or charge not being a pledge on any moveable property of the company except stock-in-trade; and (f) a floating charge on the undertaking or property of the company.

Class (e) above presents some difficulty in its interpretation. On right interpretation, however, it makes a mortgage or charge of moveable property registrable but makes the pledge moveable property exempt from registration as also stock-in-trade. The confusion in interpretation has been mainly due to the omission of a comma in the Act, after the word 'pledge' in clause (e) of Section 109 (r), which seems to suggest that it is only a pledge on any moveable properties of the company except stock-in-trade which has been exempted by the Legislature and that, therefore, the pledge of stock-in-trade would require registration, while as a matter of fact it is both the pledge of the moveable property and the stock-in-trade which have been exempted from registration. Section 109 (r) (e) on a right construction really provides that a mortgage or a charge, not being a pledge, on any moveable property of a company, except stock-in-trade, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the Official Liquidator and any creditor of the company unless the mortgage or charge has been registered with the Registrar of Joint Stock Companies, within 21 days after the date of registration.¹¹⁰

Distinction between different kinds of security :—There are three kinds of security: the first a simple lien; the second a mortgage passing the property out and out; and third his security intermediate between lien and a mortgage, viz., a pledge whereby a contract for a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true the pledger has such a property in the Article pledged as he can convey to a third person, but he has no rights to the goods without paying all the debts and until the debt is paid off the pledgee has the whole present interest. Therefore, the difference between a mortgage and a pledge of goods, is, that in the case of a mortgage the ownership of the goods passes, whereas in the case of a pledge the pledgee gets possession but no right to the goods beyond what is necessary to secure the debt.¹¹¹ In the last mentioned Madras Case, (13 Com. Cas. 21) the Bank, being unable to repay the amount due to a fixed depositor on the due date, endorsed certain promissory notes to the latter as security for its indebtedness and delivered the same to him. The arrangement was embodied in a document which was duly executed but it was not registered with the Registrar of Joint Stock Companies. The Bank was subsequently ordered to be wound up and the official liquidator contended that the agreement was void on the ground that it was not registered under Section 109 of the Indian Companies Act. It was held that Section 109 (r) (e) clearly contemplates that there can be mortgage which is also a pledge and as in this case,

110. *T. Radhakrishnan Chettiar v. Official Liquidator, Madras Peoples Bank Ltd.*, (1943) 13 Com., Cas. 21.

111. Per Willes, J. in *Halliday v. Holgate*, (1868) L. R. 3 Exch. 299.

there are all the requirements of a pledge and the transaction did not require registration—**Leach, C.J.**, who delivered the judgement in the case, observed as follows.—

“In inserting the words “not being a pledge,” in this clause, the Legislature must have had some object in view and the only object I can see it could have had, was to provide that registration should not be necessary where the person entitled to be security has obtained possession of the goods. The transaction now in question may amount to a mortgage but as there are here all the requirements of a valid pledge, it is also a pledge and being a pledge did not require registration.”

Section 116 (1) makes it obligatory on a company to file with the Registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issue of debentures of a series requiring registration under Section 109. It also provides that in default of the company discharging its obligations in respect thereof, the registration of any such mortgage or charge may be effected on the application of any person interested. In the last mentioned case, the person making the application shall be entitled to recover from the company the amount of any fee properly paid by him to the Registrar on the registration. (Section 109 (2).)

Registration of charges or mortgages in case of change in their terms : Sub-section 3 of Section 116 added by the Amending Act of 1936, requires a company to register with the Registrar the particulars of any modification of the terms or conditions or extent or operation of any mortgage or charge in much the same way as in the case of the creation of a mortgage or charge. The effect of the aforesaid sub-section is that every instrument by which the change is brought about in the terms and conditions, or extent or operation of any mortgage or charge is regarded as an instrument of mortgage or charge within the meaning of Section 109 (c) and accordingly such an instrument must be registered with the Registrar within 21 days as provided by Section 109.¹¹²

Registration of charges on properties acquired subject to charges :— Section 109 (1) (a) extends the provision of Section 109 to property acquired by a company subject to an existing share or mortgage requiring similar particulars to be filed as are necessary under Section 109, where a company acquires any property, which is subject to a charge of any one of the kinds mentioned therein (Section 109) within 21 days from the date of its acquisition.

Registration of particulars in case of series of debentures .—Section 110 provides an alternative mode of registration of particulars in a case where a series of debentures are issued entitling the debenture holders thereof *pari passu* to the benefits of a charge created thereby. It shall be sufficient in such a case, for the purposes of Section 109, if they are filed with the Registrar, within 21 days after the execution of deed containing the charge or if there is no such deed, after the execution of any debentures of the series, the following particulars :—

- (a) The total amount secured by the whole series ;
- (b) The dates of the resolutions authorizing the issue of the series and the date of the covering deed, if any, by which a security is credited or defined ;
- (c) A general description of the property charged ; and
- (d) The names of the trustees, if any, for the debenture holders.

^{112.} *Trichinopoly Mills Ltd. v. Asstt. Registrar of Joint Stock Companies, Trichinopoly.* (1941) 11 Com. Cas. 1.

Altogether with the deed or a duly verified copy thereof containing the charge or if there is no such deed, one of the debentures of the series; provided where more than once issue is made of the debentures in the series, the particulars of the dates and amounts of each issue shall be filed with the Registrar but omission to do this shall not affect the validity of the debentures issued. (Section 110).

The provisions aforesaid will not, however, apply to a case where the debentures do not rank *pari passu*. The mere registration of debentures as such, when they do not in fact rank *pari passu* would not make them rank *pari passu*.¹¹³

Section 111 further requires that the particulars required to be filed for registration under sections 109 and 110 aforesaid shall include particulars as to the amount or rate per cent of the commission, discount or allowance, paid or made, directly or indirectly, by the company to any person in consideration of his subscribing or agreeing to subscribe for any debentures of the company or procuring or agreeing to procure subscription for any such debentures. The omission to do so shall not, however, affect the validity of the debentures issued.

Effect of registration:—If any mortgage or charge on any property of a company required to be registered under Sec. 109 has been so registered, it operates as a notice to the said mortgage or charge to any person acquiring subsequent to the registration so that any person acquiring such property or any part thereof or any shares or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration. (Section 109 (2)).

Once registration is effected and certificate is given by the Registrar in respect of the document it is a conclusive evidence that the mortgage or charge created by such document is properly registered even though the particulars filed by the person applying for registration are incomplete and the entry in the register is defective. (Section 114).¹¹⁴ Once the Registrar has certified that the mortgage or charge is registered, the title of the creditor to his security becomes unassailable on the ground of the insufficiency of the registration. (*Ibid* at page 452 per Atkin, L. J.).

Effect of non-registration:—If a mortgage or charge or any property of the company (including book-debts) required to be registered under section 109 (1) is not so registered within 21 days after the date of its creation, it is void as against the liquidator and creditors of the company. Accordingly, where a company, in order to carry out a contract with the Ministry of Fuel and Power, equitably assigned by way of security all moneys due to it under the contract aforesaid to a bank, by giving irrevocable instructions to the defendant aforesaid to remit all moneys due under the contract direct to the bank in the Company's account with the bank, it was held that this constituted a charge on the book debts of the company and was therefore void against the liquidator, as it was not duly registered under S. 109.¹¹⁵

The non-registration does not, however, make the transaction void as against the company so as to make the debt irrecoverable. The company may, therefore, give a subsequent valid mortgage to secure the same debt. In fact Section 109 (1) makes the repayment of money thereby secured immediately payable. Thus the section aforesaid does not avoid the mortgage absolutely but only so far as any security on the company's properties or undertakings is thereby given.

113. *Voll & Husson etc.*, (1902) 1 Ch. 152.

114. *National Provincial & Union Bank v. Charnley*, (1924) 1 K. B. 431.

115. *Re Kent & Sussex*, (1946) 2 All E. R. 638.

Register of mortgages and charges :—Under Section 112 of the Act, the Registrar is required to keep with respect to each company, a register in the prescribed form of all mortgages and charges created by the company requiring registration under Section 109, and to enter therein, on payment of the prescribed fee, the date of creation of every such mortgage or charge, the amount secured thereby, short particulars of the property mortgaged or charged and the names of the mortgagees or persons entitled to charge. After making the entries as aforesaid, the Registrar shall return the instrument, if, any, or the verified copies thereof, as the case may be, filed in accordance with the provisions of Section 109 or Section 110 to the person filing the same. The Registrar shall also enter in the register aforesaid, on payment of prescribed fee, the fact of the appointment of the Receiver notified to him under Section 118 (1) of the Act. The Register kept under this section shall be open to inspection, by any person, on payment of the prescribed fee, not exceeding one rupee for each inspection. The right of inspection includes the right to take copies. ¹¹⁶

The Registrar is also required to keep a chronological index in the prescribed form and with prescribed particulars of the mortgages or charges registered with him under this Act. (Section 113). He is also required to give a certificate under his hand to the registration of any mortgage or charge registered under Section 109 stating the amount thereby secured. Such certificate shall be conclusive evidence that the requirements of Sections 109 to 112, as to registration, have been complied with. (Section 114).

A copy of every certificate of registration given under Section 114 is to be endorsed on every debenture or certificate of debenture stock which is issued by the company and the payment of which is secured by the mortgage or charge so registered. (Section 115).

Copy of instrument creating mortgage or charge:—Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under Section 109 to be kept at the registered office of the company provided that in the case of series of uniform debentures a copy of one such debenture shall be sufficient. (Section 117).

Company's registers of mortgages:—Every company is required under Section 123 (1) to keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company and all floating charges on the undertakings or any property of the company, giving in each case a short description of the property, mortgage or charge, the amount of mortgage or charge (except in the case of the security to the bearer), the names of mortgagees or persons entitled thereto. Any directors, manager or other officer of the company who knowingly or wilfully authorises or permits any default in complying with the entries required to be made as mentioned above, is liable to a fine not exceeding five hundred rupees but such default would not invalidate the charge or mortgage even though the person in whose favour it is created is a director. ¹¹⁷.

116. *Nelson v. Anglo-American Mortgage Agency Co.*, (1897) 1 Ch. 180.

117. *Writ v. Horton*, 12 A. C. 371.

Registration of the satisfaction of mortgages and charges:—Section 1210 (1) makes it obligatory on the company to give intimation to the Registrar of payment or satisfaction of any charge of mortgage created by the company within 21 days from the date of the payment or satisfaction thereof. The Registrar shall, on receipt of such intimation, cause a notice to be sent to the mortgagee calling upon to show cause within a time (not exceeding 14 days) to be fixed by such notice why the payment or satisfaction of the charge or mortgage should not be recorded. If no cause is shown, the Registrar shall order that a memorandum of satisfaction be entered on the Register and shall, if so required, furnish the company, with a copy thereof. If the cause is shown, the registrar shall record a note to that effect in the register and shall inform the company that he has done so. Thus the registrar has a power, where no cause is shown, to enter on the register a memorandum of satisfaction, in respect of the mortgage or charge but if cause is shown, he cannot do anything else except to record the fact that the cause has been shown and is powerless to do anything else.

Right of inspection of register of mortgages, etc. :—Copies of instruments kept by a company, at its registered office in pursuance of Section 117 and the register of mortgages kept by the company, in pursuance of Section 123, shall be open to inspection, at all reasonable times, of any creditor or member of the company gratis and the register of mortgages shall also be open to the inspection of any other person on payment of a fee not exceeding rupee one for each inspection as the company may prescribe. Failure to give inspection of the said copies or the register would make the company liable to a fine not exceeding fifty rupees and a further fine not exceeding twenty rupees for every day during which the default continues and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty. The Court is also empowered to compel an immediate inspection of the copies or registers. (Section 124 (2).)

The register of holders of debentures is likewise open to inspection of the registered holders of such debentures and shareholders of the company, except when it is closed in accordance with the Articles during such periods (not exceeding in the whole 13 days in a year) as may be specified in the Article, subject, however, to such reasonable restriction as the company may in general meeting impose so that at least two hours in each day are appointed for inspection. Every such debenture holder may require a copy of the register or any part thereof on payment of 6 annas for every 100 words or fractional part thereof required to be copied. Similarly, a copy of any trust deed for securing any issue of debentures shall be forwarded to every holder of any such debenture at his request and on payment of prescribed fee which in case of printed trust deed should not exceed one rupee and where the trust deed has not been printed it would be six annas for every 100 words or fractional part thereof, required to be copied. The refusal to give inspection or a copy or the non-forwarding of the same, makes the company liable to a fine not exceeding Rs. 50 and to a further fine not exceeding twenty rupees for every day during which the refusal continues. It also makes every officer of the company who knowingly authorises or permits the refusal, liable to the like penalty. The Court may also by order compel an immediate inspection of the Register. (Section 126).

Penalty in certain cases :—If a company makes default in filing with the Registrar for registration the particulars of any mortgage or charge created by the company, or of the payment or satisfaction of debt in respect of which a mortgage or charge has been registered under Section 109 or Section 109 A, or of the issues of the debentures of a series requiring registration with the Registrar, then, unless the registration has been effected on the application of some other person, the company and every officer of the company or other person who is knowingly a party to the default shall be liable to a fine not exceeding Rs. 500 for every day during which the default continues. Likewise if a company makes default in complying with any of the requirements of the Act, as to the registration with Registrar of any mortgage, or charge created by the company, the company and every officer of the company who knowingly or wilfully authorises or permits the default shall, without prejudice to any other liability, be liable to a fine not exceeding Rs. 1,000. Similarly if any person knowingly or willingly authorises or permits the delivery of any debentures or certificate of debenture stock, requiring registration with the Registrar, under the provisions of this Act, without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability, be liable to a fine not exceeding Rs. 1,000. (Section 122).

It may be noted in this connection that the debentures are not to be treated as issued until they are actually delivered. 118

Power of Court to extend time for registration in certain cases :—The Court on being satisfied that the omission in the Register of mortgages or charges within the time required by Section 109 or that the omission of mis-statement of any particulars with respect to any such mortgage or charge, or the omission to give intimation to the Registrar of the payment or satisfaction of a debt for which a charge or mortgage was created, was accidental or due to inadvertence or to some other sufficient cause or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant a relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended or as the case may be that the omission or statement be rectified and may make such orders as to cause of the application as it thinks fit. Where, however, the Court extends the time for the registration of a mortgage or charge, the order shall not prejudice any right acquired in respect of the property concerned prior to the time when the mortgage or charge is actually registered (Section 120).

The grounds for such extension of time :—The Section aforesaid gives power to the Court to extend time if the Court is satisfied that the omission to register a charge or mortgage has been accidental or due to inadvertence or to some other sufficient cause or is not of a nature to prejudice the position of creditors or shareholders of the company, or there are other grounds which would make it just and equitable to grant it relief.

The words "accidental" or "due to inadvertence" have a very wide meaning.¹¹⁹

"Accident"—Meaning of :—The word "accident" has been defined to mean that which falls or happens or comes to, generally with a sub-condition of something unforeseen, unexpected, unfortunate or unnecessary and also as that which happens unforeseen or by chance. It means something fortuitous or unexpected. Per Lord Macnaghton in *Fenton v. Thorley & Co.*¹²⁰

"Inadvertence" :—The word 'inadvertence' has been held to include ignorance of the provisions of law.¹²¹ But it is something different from a mistake,¹²² and also precludes the idea of bad faith. It means negligence or carelessness.¹²³

'Just and equitable' :—It is difficult to say what is exactly meant by the words "just and equitable." Section 120 referred to above allows the Court discretion to extend time on such term and condition as seems to the Court just and expedient. Where the extension was applied for after the company creating the charge had gone into liquidation, the application for extension was not allowed on the ground that it would be unjust to the creditors of the company to grant any extension after the company had gone into liquidation as the effect of the order extending time in such a case would obviously be to reduce the property available to the creditors.¹²⁴

Effect of extension of time :—If the Court extends time for registration and the mortgage is registered within that time, the mortgage constitutes a valid charge *ab initio* that is from the date of the execution, subject only to such conditions as are imposed by the Court in the order which extended the time.¹²⁵ The order of the Court granting extension for the registration of mortgage or charge must not, however, prejudice any rights acquired in the meantime and before actual registration. The usual practice is to insert words to the effect that the order is to be without prejudice to the rights of the parties acquired prior to the time when such mortgage or charge or debenture is actually registered.¹²⁶ The idea is that the Court should, while making such order, save the rights of person who has become creditor of the company before the registration is effected.¹²⁷ The provision is intended to protect rights acquired by charge, execution or otherwise against the property of the company, in the interval between the period of 21 days provided for in the statute and the time when it is actually registered. Such a provision would not, therefore, protect the

119. *Jackson & Co., Ltd.*, (1899) 1 Ch. 848.

120. (1903) A. C. 443 (446).

121. *Jackson & Co. Ltd.*, (1899) 1 Ch. 848.

122. Per Lord Smith, L. J. in re ; *Piers*, (1899) 1 Q. B. 627.

123. *Ex-parte Lenanton*, 53 J. P. 263.

124. In the matter of *Dinshaw & Co., Bankers Ltd., in Liquidation*, A. I. R. (1937) Oudh 62.

125. *Ram Norain v. Radha Krishan*, A. I. R. 1930 P. C. 66.

126. *Joplin Brewery Co.*, in re : (1902) 1 Ch. 79.

127. *Johnson & Co.*, in re : (1902) 2 Ch. 101.

rights of unsecured creditors.¹²⁸ If, however, after the order for extending time is made, but before actual registration, a winding up commences, the mortgage or charge registered subsequently to the commencement of the winding up will not be effective against the general body of creditors.¹²⁹

Validity of charge is not dependent on date of registration :—It is important to note the distinction that what avoids the charge is not the lack of registration, but the neglect to send in the particulars to the Registrar, for the validity of the charge does not depend on the date on which the Registrar chooses to make the necessary entry in the register, and accordingly the provisions of Section 109 are complied with, if the particulars of the charge are finally submitted within 21 days from the date of execution of the charge. So where in spite of the particulars being submitted in time, the registration of the charge was allowed to stand over for a period of over two years owing to some outstanding dispute about the fee, it was held that the security would not be destroyed thereby.¹³⁰

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128. *In re : Eshemann Bros. Ltd.*, (1906) 2 Ch. 697.

129. *Anglo-Oriental Carpet Co.*, (1908) 1 Ch. 914.

130. *Benares Bank Ltd. v Bank of Bihar Ltd.*, A. I. R. 1947 All 117.

CHAPTER XIII

CONTRACTS

General rules :— The following four rules must be kept in view in contracts with a company :—

(1) A contract *ultra vires* the company is wholly void and cannot be enforced. Such an *ultra vires* contract cannot even be ratified and if a company ratifies it without knowledge of the fact that it was a contract entered into *ultra vires*, it will not be bound by the contract.¹ A company cannot even be estopped from denying that they have entered into a contract which it was *ultra vires* for it to make, for no corporate body can be bound by estoppel to do something beyond its powers.²

(2) A contract which is not *ultra vires* the company but is *ultra vires* the directors, as being in excess of their authority, is invalid but it may be ratified by the shareholders and until and unless it is so ratified it would not be binding on the company though it may, under certain circumstances, be binding on the company, by the application of the rule of estoppel.³ To render such a contract valid, however, the acquiescence of the shareholder must be of the same extent as the consent which would have given validity to it from the first, viz., the acquiescence of each and every member of the company and this acquiescence cannot be presumed unless the knowledge of transaction is brought home to every one of the remaining shareholders. By knowledge of the transaction is meant the knowledge of the invalidity of the transaction, for there can be no ratification without an intention to ratify and there can be no intention to ratify an illegal act without the knowledge of the illegality.⁴

(3) A contract entered into on behalf of a company before its incorporation by its promoters or by some person professing to act on its behalf cannot be ratified by a company after its incorporation⁵ though a company may, after its incorporation, enter into a new contract embodying the terms of the old one, as there is nothing to prevent it from entering into a new contract to carry into effect the terms of the pre-incorporation contract.⁶ To the above rule an exception seems to have been provided by Sections 23(h) and 27 (e) of the Specific Relief Act. The former Sub-clause provides that when the promoters of the public companies have, before its incorporation, entered into a contract, for

1. *Taluk Board, Chidambaram v Varadesashe Iyengar*, A. I. R. 1938 Mad. 226.

2. *Halsbury Law of England*, Vol. 13, page 474 quoted with approval in *Sabarathnam v. Official Liquidator*, A. I. R. 1943 Mad. 111 (116).

3. *Grant v. United Kingdom Switch Back Rly. Co.*, 40 C. D. 135 ; & *Royal British Bank v. Turquand*, (1856) 6 E. & B. 327 ; & *Irvine v. Union Bank of Australia*, (1877) 2 A. C. 386 (P. C.).

4. *Primila Devi v. Peoples Bank of Northern India*, (1939) 9 Com. Cas. 1 (P. C.).

5. *Kilner v. Baxter*, (1866) L. R. 2 O. P. 174 ; & *Natal Land & Co. v. Panli Colliery etc., Syndicate*, (1904) A. C. 120 ; & *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, (1902) 1 Ch. 146.

6. In re : *Dale & Plant*, (1889) 61 L. T. 206 ; & *King v. Ellen David & Sons, Bill Posting Ltd.*, (1916) 2 A. C. 54.

the purposes of the company, and such a contract is warranted by the terms of the incorporation, the specific performance of such contract may be obtained by the company. The latter sub-clause provides that specific performance of a contract may be enforced against the company when the promoters of a public company have before its incorporation entered into a contract provided the company has ratified and adopted the contract, and the contract is warranted by the terms of the incorporation. The last mentioned sub-clause clearly suggests that a public company may ratify and adopt a contract entered into on its behalf, before its incorporation, by the promoters of the company, and such a contract may be specifically enforced, if so ratified and adopted, provided it is warranted by the terms of the incorporation. The English decisions referred to above would, therefore, stand modified in their applicability to public companies in India to the extent mentioned in the aforesaid sections of the Specific Relief Act. The matter has been more fully discussed under the heading "Preliminary Agreements."

(4) A company cannot make a binding contract until it is entitled to commence business (Section 103). This does not, however, mean that the company may not enter into any contract unless the provision of Section 103 of the Indian Companies Act have, in the first instance, been complied with. The company can make contracts in respect of its intended business, even before the date at which it is entitled to commence business. Such contracts shall, however, be provisional only and shall not be binding on the company till the date aforesaid but shall become binding on that date.⁷ The matter has been discussed at length under the heading "Commencement of Business".

Form of Contracts :—Even in case of a company it is not always necessary to enter into a contract under seal or in writing. The practice to have all contracts under seal was in vogue previously but has since been considerably relaxed. The following observations of Boville, C J., in an English case on the point,⁸ are worthy to note in this connection :—

Originally "all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as hiring of servant and the like. But, in progress of time as new descriptions of corporations came into existence, the Courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict; and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by recent cases are now too firmly established to be questioned by the earlier decisions, which if inconsistent with them must, I think, be held not to be law. These exceptions apply to all contract by trading corporations entered into for the purposes for which they are incorporated."

Again it has been held by Wrightman, J., in another English case,⁹ after a review of various cases on the point, that whenever a contract is made with relation to

7. *Vide* S. 103 (3).

8. *South of Ireland Colliery Co v. Waddle*, (1868) L. R. in 3 C. P. 469.

9. *Handerson v. Australian Royal Mail Steam Navigation Co*, 24 L. J. Q. B. 322.

the purposes of the corporation, it may, if the corporation be a trading one, be enforced though not under seal.

Rule embodied in S. 88 of the Act :—Section 88 of the Indian Companies Act adopts the above view and enacts that in case of contract which if made between private persons must be by law reduced to writing, may be made on behalf of the company in writing signed by a person duly authorised by it expressly or by implication and the same may be varied or discharged by such a person. It also provides that the company may enter into an oral contract, in a case where it is competent for private individuals to make a contract by parole and such a contract may be made on behalf of the company by a person duly authorised by it expressly or by implication and may, in the same manner, be varied and discharged. All such contracts shall be effectual in law and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives as the case may be.

Effect of Contract :—Once the rights of a party dealing with a company have become fixed by a contract, the company cannot, by a resolution subsequently passed by it, alter those rights.¹⁰ Accordingly it has been held that a policy holder of a Life Assurance Company is not bound by any alteration in the rules made after the contract between himself and the company had become concluded.¹¹

Bill of Exchange, Hundi or Promissory Note :—Section 89 enacts that a bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company, if made, drawn, accepted or endorsed in the name of or by or on behalf or on account of the company by any person acting under its authority express or implied. Thus before a bill of exchange, or a hundi, or a promissory note can be binding on the company, two conditions must have been complied with, viz., (1) the bill of exchange, hundi or promissory note must have been made, drawn, accepted or endorsed in the name of the company or by or on behalf of the company; and (2) it must be so made, drawn, accepted or endorsed by a person acting under its authority express or implied. Thus it is of the utmost importance that the name of the company to be charged upon the negotiable instrument should be clearly stated on the document so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand.¹² In a recent Calcutta case,¹³ it has been held that the words "Mitra & Sons, Managing Agents," Lister Antiseptic Co. on the back of certain hundies drawn in favour of Mitra & Sons were merely descriptive of the firm of Mitra & Sons, who were the managing agents of the company and did not bind the company. The learned Chief Justice in the last mentioned case quoted with approval the observation of Lord Justice Kennedy in an English case,¹⁴ which are re-produced below :—

10. *Ellen v Gold Reefs of West Africa Ltd.*, (1900) 1 Ch. D. 656; & *Conjeevaram v. Kanswami Naicker*, 28 I. C. 847.

11. *Tanjore Life Assurance Co. Ltd.*, in re: 43 M.L. 333.

12. *Sadasuk v. Kishan Prasad*, 46 I. A. 38 (36)

13. *Sree Lal Mangtu Lal v Lister Antiseptic Dressing Co. Ltd.*, 52 Cal. 802. See also *Jasodia Cotton Mills Ltd.*, in re, 81 C. W. N. 638.

14. *Chapman v Son Methurst*, (1907) 1 K. B. 927.

"The proper test to apply in such cases is laid down in *Lindley on Companies*, 6th Edition, Volume 1, at page 280, where it is said 'the question is in every case one of construction. Is the bill or note of the company or not? Does it really purport so to be, for, although given for the purposes of the company, the Bill or note may not have been purported to bind it?' If on the true construction of the instrument the bill or note is the bill or note of the company, the company will be liable upon it and not the individuals whose names are on it, unless the bill or note is the bill or note of both. On the other hand if on the true construction of the Bill or note it is not a bill or note of the company the persons whose names are upon it will be liable upon it, whether they intended to be so or not."

Again where the articles of association of a company gave power to the Managing Agents to make contracts and sign receipts on behalf of the company, but there was no power given to the Managing Agents to make the promissory notes on behalf of the company and managing agent of the company Mr. T. B. Gilani signed certain promissory notes in the following terms:—

"Mr. T. B. Gilani, Managing Director, Debra Dun Electric Tramway Co. etc."

It was held that the name of the maker of the promissory note was Gilani and the words appended were mere description of Gilani and that even if Mr. Gilani had acted in the proper form which would have bound the company, the company was not bound because Mr. Gilani was not the authorised agent of the company for the purpose.¹⁵

In a recent Allahabad case,¹⁶ it has been held, after the review of case-law on the point, that before a company can be held liable on a pronote, executed by managing agents of the company, it must be shown and found that not only the money came into the hands of the company but that it was in effect put into their hands by the creditor through the managing agents, it being understood by both parties, when the note was executed, that the company would be liable for repayment. The company cannot, therefore, be made liable on the pronote executed personally by the managing agents by the mere proof of fact that the money so borrowed went to the benefit of the company.¹⁶

Where, however, one of the secretaries, treasurers and agents of a company signed a pronote in his own name for the price of machinery purchased by the defendant company and the pronote aforesaid was written on a form of letter of the company and bore a rubber stamp impression of the company it was held that the pronote was signed on behalf of the company.¹⁷ Macleod, C.J., made during the course of his judgment the following pertinent observations.

"The only question is whether it can be said that this pronote has been drawn on behalf of the company, and, for that purpose we must look at the contents of the note and we find that there at the top of the Note the heading 'The Gajanan Industrial & Trading Co. Ltd., Wai', and there is rubber stamp which was evidently used as the stamp of the company in addition. There can be no doubt that the secretaries, treasurers and agents signed the pronote on behalf of the company, and

15. *Jhandu Mal & Sons v. Official Liquidator, D. D. Electric Tramway Co.*, A. I. R. 1930 All. 778.

16. *Suraj Bahu v. Jaitly & Co.*, A. I. R. 1946 All. 372.

17. *Poona Chitrashala Steam Press v. Gajanan Industrial & Trading Co.*, 24. B. L. R. 335.

there is no reason for dismissing the claim, because the stamp appears at the top of the paper, instead of beneath the signature. The company undoubtedly purchased the machinery, used the machinery and was liable to pay for the machinery."

In yet another case a manager of the Bank was held to have authority to make valid transfer of a negotiable instrument on behalf of the Bank on the ground that he was the agent of the Bank for performing ordinary banking transactions and that a transfer of a negotiable instrument was a very ordinary transaction.¹⁸

Execution of deeds on behalf of Company by an Attorney :—Section 90 enacts that a company may, by writing under its common seal, empower any person either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place either in or outside British India. Every deed when so signed by the said attorney on behalf of the company shall bind the company and have the same effect as if it were under the common seal of the company. A provision is generally made in the Articles of Association for the appointment of attorneys but even where the Articles are silent, Section 90 would authorise the company to make such appointment for the purposes of execution of deed in or outside British India. Before the Amending Act of 1935, Section 90 only provided for empowering a person to execute deeds on behalf of the company in any place outside British India. The amendment, however, makes the section equally applicable to deeds outside British India.

Official Seal for use outside British India :—The company may, if so authorised by its Articles, have for use in any territory, district or place outside British India an official seal which shall be a facsimile of the common seal of the company with the addition on its face of the name of the place or places where it is to be used. The company in that case may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district or place outside British India, to affix the same to any deed or other document in that territory, district or place. The authority of any such agent shall continue during the period, if any, mentioned in the instrument conferring the authority, but if a period is mentioned therein, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him, the person affixing such official seal shall certify the date and the place of affixing the same by writing under his hand on the deed to which it is affixed. A deed to which such an official seal is duly affixed shall be binding on the company as if it had been sealed with the common seal of the company. (Section 91). It is thus apparent from the above that before any official seal, as above described, can be used for transaction outside British India the Articles of Association of a company must authorise the use of such a seal and the seal to be used must be a facsimile of the official seal bearing on the face of it an imprint showing the name of every territory, district or place where it is to be used. Again only such person as is authorised by the company by writing under its common seal can use such seal for the execution of the documents outside British India and he must, while affixing the same to any deed, certify the date and place of affixing the same by writing under his hand.

18. *Hindustan Assurance Society v. Gurditsingh*, 80 I. C. 741.

CONTRACT WITH DIRECTORS

Conditions Precedent :—A director stands in a fiduciary relation with a company and cannot, therefore, in the absence of any such provision to that effect in the Articles, contract with the company.¹⁹ Even where a director has the right to contract with the company it is his duty to disclose his interest to the Board of Directors in order to enable the other directors to scrutinize the terms of the contract carefully.²⁰

Duty to Disclose Interest :—Section 91 A gives a statutory recognition to the principle laid down above and enacts that every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company, must disclose the nature of his interest at meeting of the directors at which such contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after acquisition of his interest or the making of the contract or the arrangement. The reason of the rule as pointed out by Lord Cairns in *Parker v. Mackenna*²¹ is that no man acting as an agent can be allowed to put himself in a position to which his interest and duty will be in conflict. The company is entitled to the collective wisdom of its directors and if any of such directors is interested in a contract, the company loses the benefit of the directors' unbiased judgment. The duty to disclose is based more or less on the principle that where there is a conflict between duty and interest, an agent must disclose any understanding likely to result in any gain to him, arrived at between the servant or agent and a third person who enters into a contract with the master or principal, otherwise such a secret bargain, being a fraud on the master or principal, will entitle the latter to rescind the contract with such third person.²² Thus a director is precluded from dealing on behalf of the company with himself and from entering into engagements in which he has a personal interest conflicting or which possibly may conflict with the interest of those whom he is bound by fiduciary duty to protect.²³ The principle is observed so strictly that no question is even allowed to be raised as to the fairness or unfairness of a contract in question.²⁴ The interest of the director in the transaction must, however, be personal and either pecuniary or material. It may be direct or indirect but it must be adverse to a company of which he is a director.²⁵

When disclosure may be unnecessary :—Where the real nature of the interest is known to all the directors it is not necessary to make a formal disclosure.²⁶

19. *Albion Steel Etc. Co. v. Martin*, 1 Ch. P. 580.

20. *Imperial Mercantile Credit Assn. v. Coleman*, L. R. 6 H. L. 189 ; & *Costa Rica Rail Co. v. Forwood*, (1900) 1 Ch. 756.

21. 10 Ch. A. 96.

22. *Transvaal Lands Co. v. New Belgium (Transvaal) Land & Development Co.*, (1914) 2 Ch. 486; *Panama & South Pacific Telegraph Co. v. India Rubber etc Co.*, (1875) 10 Ch. 515; *Shipway v. Broadwood*, (1899) 1 Q. B. 369 ; *Hukman v. Kent etc.*, (1915) 1 Q. B. D. 881; Followed with approval in *Boulton Bros. v. New Victoria Mills*, A. I. R. 1929 All. 87 (94).

23. *North-West Transportation Co. v. Beatty*, (1887) 12 A. C. 589.

24. *Bray v. Ford*, (1896) A. C. 44.

25. Per Wadia, J., in *Pratt (Bombay) Ltd., R. D. Sason & Co.*, A. I. R. 1936 Bom. 62.

26. *Imperial Mercantile Credit Assn. v. Coleman*, L. R. 6 Ch. A. 558 (568). *P. Venkatachalaiputti v. Gantoor Cotton Mills*, A. I. R. 1929 Mad. 353; affirmed in A. I. R. 1932 P. C. 244.

Again a general notice that a director is a director or a member of any specific company or is a member of any specified firm and is to be regarded as interested in any subsequent transaction may be a sufficient disclosure and after such general notice it is not necessary to give any special notice relating to any particular transaction with such firm or company. ²⁷

Effect of non-disclosure of interest :—Non-disclosure of the interest of a director will not *per se* render the contract voidable, but will render the interested director liable to account for secret profits.²⁸ Again sub-section (2) of Section 91A makes every director liable in case of such non-disclosure to a fine not exceeding Rs. 1,000/- while Sub-Section (1) of Section 91B disqualifies an interested director to vote on the transaction in which he is interested directly or indirectly providing further that his presence shall not be counted for the purposes of forming a quorum at the time of voting over such contract and that if he does so vote, his vote shall not be counted. Such a director may, however, vote on any contract of indemnity against any loss which he may suffer by becoming or being a surety for the company. The prohibition of voting by the interested director does not, however, apply to a private company unless the latter is a subsidiary company of a public company. In the last mentioned case the provisions aforesaid shall apply to all contracts or arrangements, made on behalf of the subsidiary company with any person other than the holding company. ²⁹

CONTRACT APPOINTING A MANAGER OR A MANAGING AGENT

Requirements of S. 91 C :—Section 91 C provides that where a company enters into a contract for the appointment of a manager or the managing agent of the company in which any director of the company is directly or indirectly concerned or interested or varies any such existing contract, the company must within 21 days from the date of entering into the contract or varying the same send an abstract of the terms of the contract or variation as the case may be, together with a memorandum clearly indicating the nature of the interest of the director in such contract or in such variation, to every member. The contract itself is also to be kept open to the inspection of any member at the registered office of the company. The default in complying with the above requirements makes the company liable to a fine not exceeding Rs. 1,000 and every officer of the company who knowingly or wilfully authorises or permits the default is liable to the like penalty.

CONTRACT BY AGENTS OF A COMPANY IN WHICH THE COMPANY IS UNDISCLOSED PRINCIPAL,

Requirements of Section 91 D :—If a Manager or other agent of a company, other than a private company (not being the subsidiary of a public company), enters into a contract for or on behalf of the company in which the company is an undisclosed principal the manager or agent must at the time of entering into such contract make a memorandum in writing of the terms of the contract and specify therein the person with whom it has been made. Manager or the agent concerned must forthwith deliver

27. *Proviso to s. 91 A.*

28. *Pydah v. Guntur Cotton Mills*, A. I. R. 1929 Mad. 353.

29. *Vide s. 91 B.*

the Memorandum aforesaid to the company and send copies to the directors and such memorandum is to be filed in the office of the company and laid before the directors at the Next Board Meeting. The default in complying with these requirements makes the contract, at the option of the company, void as against the company and further makes the manager or other agent guilty of default liable to a fine not exceeding Rs. 200. (Section 91 D). The object of the above provisions is obviously to prevent a manager or other agent of a company from passing off unprofitable contract on to the company or depriving the company of the benefits of the profitable ones.

REGISTER OF CONTRACTS

Register of contracts in which directors are interested :—The company is required to keep a register of contracts, in which the directors are directly or indirectly concerned or interested and such a register shall be open to inspection by any member of the company at its registered office during business hours. Every officer of the company who knowingly and wilfully acts in contravention of the above provision shall be liable to a fine not exceeding Rs. 500. [Section 91 A (4)].

CHAPTER XIV

DIRECTORS

DUTIES, POWERS AND RIGHTS OF DIRECTORS

Definition of the term :—The control of a company is almost invariably vested in its directors, who direct its affairs from time to time. The term “director” has not been defined in the Act, which simply says that ‘director’ includes any person occupying the position of a director by whatever name called [Section 2 (1) (5)]. A company has no person and so it cannot act in its own person; it must act by agents and usually those persons through whom it acts, and by whom the business of the company is carried on or superintended, are termed directors.¹

Position of directors :—It is difficult to define the precise position of directors. The Indian Companies Act is silent on the point and does not define their status. They are sometimes described as trustees, agents or managing partners and yet strictly speaking they may not be any one of these in the full sense.² As observed by Lord Selbourne in *G. E. Railway Co. v. Turner*³ the directors are the mere trustees or agents of the company—trustees of the company’s money and property; agents in the transaction which they enter into on behalf of the company. “It does not matter much what you call them so long as you understand what their true position is, which is that they are commercial men, managing a trading concern for the benefit of themselves and all other shareholders.⁴ In *Ferguson v. Wilson*⁵ Cairns, L. J., while explaining their position observed “What is the position of the directors of a public company? They are merely agents of the company. The company itself cannot act in its own person, for it has no person, it can only act through directors and the case is, as regards those directors, merely the ordinary case of principal and agent for whatever an agent is liable, those directors would be liable. Where the liability would attach to the principal and principal only, the liability is the liability of the company.” Lord Cranworth in *Aberdeen Railway Co. v. Blackis*⁶ described them as a body to whom is delegated the duty of managing the general affairs of the company observing further that a corporate body can only act by agents and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting and as such they have duties to discharge, of a fiduciary nature, towards their principal,

1. *Per Lord Cairns in Ferguson v. Wilson* (1866) L. R. 2 Ch. 77 (89) and *Palmer's Company Law* (16th Ed.) page 168].

2. *Faure Electric Accumulator Co.*, (1889) 40 Ch. D. 141, 151.

3. *G. E. Railway Co. v. Turner* (1872) 8 Ch. A. 149.

4. *Per Jessel, M. R. in Forest of Dean Coal Mining Co.*, (1878) 10 Ch. D. 450.

5. (1866) L. R. 2 Ch. A. 77.

6. 1 Macq. 461.

The correct position seems to be that though the directors have some of the attributes of the trustees at least as regards any assets which may come into their hands⁷ yet they are not trustees but are essentially agents of the company and as such they have only power to act within the scope of their authority prescribed by the Memorandum and Articles of Association of a company, in spite of occasional use of loose expressions to the contrary. In *City Equitable Fire Insurance Co., Inre.* Romer, J.⁸ made the following pertinent observations in this connection :—

“ It has sometimes been said that directors are trustees. If this means no more than directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of analogy, of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of director and the duties of a trustee of a will or a marriage settlement.”

As observed by James, L. J., in *Smith v. Anderson*⁹ the distinction between a director and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property and deals with it as a principal, as owner and as master, subject only to an equitable obligation to account to some person to whom he stands in relation of trustee and who are his *cestui que trust*. The office of director is that of paid servant of the company. A director never enters into a contract for himself but he enters into contract for his principal, that is, for the company of whom he is a director and for whom he is acting. He cannot sue on such contract nor be sued on them unless he exceeds his authority. The Madras High Court has also held, following an earlier Bombay Ruling¹⁰ that the directors of a company are not trustees in whom the property of the company has become vested in trust for any specific purposes.¹¹ Ramesam, J. who delivered the judgement in that case while holding that it is now settled law that the directors of companies are not trustees, quoted with approval a passage from *Deen Coal Mining Co. in re.*¹² where Jessel, M. R. said, “Directors have sometimes been called trustees of commercial trusts and sometimes, they have been called managing partners. They are no doubt trustees of the assets which have come into their hands or which are under their control but they are not trustees of the debt due to the company.” It has been held in a recent Patna case,¹³ that though the position of a director of a company differs from that of trustees in some respect yet to the extent of their being interested in the moneys of the company they are trustees and as such, jointly and severally liable for the breach of trust. To sum up, the directors are essentially agents of the company and are also trustees of the assets of the company.

A director or a managing director is not, however, a person in the employment of the company¹⁴ though he is in a way servant of the company : being the agent of the company for carrying out its business.¹⁵

7. *Forst Dean Coal Mining Co., in re* (1878) 10 Ch. 460.

8. (1925) 1 Ch. 407

9. (1880) 15 Ch. D 247 (215)

10. *Kathiawar Trading Co. v. Veer Chand Deep Chand*, 18 Bom. 119.

11. *Narasimha Iyyanger v. Official Assignee Madras* A. I. R. 1931. Mad. 53 (59)—44 Mad. 153..

12. (1879) 10 Ch. 450

13. *Peninsular Locomotive Co. v. Langham Reed* A. I. R. 1937 Patna 293.

14. *Re. Lee & Behram & Co. Ltd.*, (1932) 2. Ch. 46

15. *Gulab Singh v. Punjab Zamindara Bank* I. L. R. 1943 Lah. 28 (37)

DUTIES OF DIRECTORS.

(i) **Duties arising from their position as governing agents of the Company:**—The directors are agents of the company with powers and duties of carrying on the whole of its business subject to the articles and statutory provisions but they are not agents of the individual shareholders.¹⁶ They stand in a fiduciary relation to the company in the sense that if they take an unfair advantage of their position they may have to account for the resulting profit.¹⁷ They being fiduciary donees of their powers, are bound to exercise them so as not to give themselves advantage over other shareholders¹⁸ and must act for the benefit of the company in exercise of their duties *e.g.*, allotting or forfeiting shares, making calls or approving transfer and must not make a secret profit out of their office.¹⁹ Again as the director stands in a fiduciary relation to the company, he is disqualified from contracting with the company either on his own behalf or on behalf of any company or firm in which he is interested as shareholder or director without the sanction of the company in general meeting unless the articles of the company specifically authorise him to that effect.²⁰ The reason of the above rule is that the company is entitled to the collective wisdom of the directors and if all or any of them are interested in a contract the company, loses the benefit of its directors' unbiassed judgment.

When a director enters into a contract with the company, there arises a situation in which there is conflict between the interest and the duty of the director and there is a likelihood of the director sacrificing the interest of the company to better his own situation. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of the contract in question.²¹ Appointment of a director as Chairman of the Board or as Managing Director, without an increase of salary is, however, not a contract in which the director is interested.²²

(ii) **Duties arising from their position as trustees.** The directors, being also in position of trustee in respect of company's assets in their hands or under their control, are bound to exercise the trust with fidelity and reasonable diligence. Accordingly it has been held that a director of a company on the verge of insolvency cannot be allowed the privileged position of a secured creditor by merely discharging a small portion of the company's indebtedness.²³ Courtney Terrel, C. J., in the course of his judgment in the last mentioned case observed :—“This is not a case in which the contract is entered into between two independent persons; it is in the nature of a contract between the trustee and his *cestui que trust*. The trustee, by discharging a small portion of the *cestui que trust* indebtedness puts himself in the position of a secured creditor as

16. *Faure Electric Accumulator Co.*, 40 Ch. D. 141.

17. *Allin v. Hvatt* (1914) 30 T. L. R. 444.

18. *Alexandra v. Automatic Telephone Co.* (1900) Ch. 56 (72).

19. *Parker v. McKenna*, (1875) 10 Ch. 96; *Harris v. North Devon Rly. Co.*, (1856) 30 Beav 384; *Gillbert's case*, (1870) 5 Ch. 559; *Bennett's case*, (1867) 15 De. G. M. & G. 284.

20. *Transvaal Land Co. v. New Belgium Land Co.*, (1914) 2 Ch. 448.

21. *Aberdeen Railway Co. v. Blackie*, 1 Macq. 461 & *Bray v. Ford*, 1896 A. C. 44.

22. *Foster v. Foster* (1916) 1 Ch 532.

23. *Thakur Dass v. Ram Gulam Singh*, A. I. R. 1937 Patna 151.

again — the unsecured creditor, and the Government therefore prevents the company from paying its creditor equitably.....It is not right that the director of an insolvent company about to go into liquidation should be allowed the privileged position of a secured creditor by merely discharging a small portion of the company's indebtedness."

Again it is the duty of each director to see that the company's moneys are from time to time in the proper state of investment, except so far as the Articles of Association may justify him in delegating that duty to others. He should also before signing a cheque on behalf of the company or parting with one signed by him, satisfy himself that a resolution has been passed by the Board or Committee of the Board as the case may be authorising the signing of the cheque and where such a cheque has to be signed between meetings, he should obtain the confirmation of the Board subsequently to his signature, but while signing a cheque which appears to be drawn for a legitimate purpose he is not responsible for seeing that the money is in fact required for that purpose or that it is subsequently applied for that purpose, assuming of course that the cheque comes before him for signature in the regular way having regard to the usual practice of the company. ²⁴ Where a director who was a creditor of the company knowing that the company is in insolvent circumstances obtained hypothecation of the stock-in-trade and outstandings of the company, the transaction was set aside on the ground of fraud. ²⁵

In ascertaining the duties of a director of a company it is necessary to consider the nature of the company's business and the manner in which the work of the company is, reasonably in the circumstances and consistently with the Articles of Associations, distributed between the directors and other officials of the company. In discharging those duties a director must act honestly and must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take in the circumstances, on his own behalf. But he need not exhibit in performance of his duties, a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; in other words, he is not liable for mere errors of judgment. Nor is he bound to give continuous attention to the affairs of his company, his duties are of intermittent nature to be performed at periodical Board meetings and at the meetings of any committee to which he is appointed; and though not bound to attend all such meetings, he ought to attend them when reasonably able to do so; and in regard to all duties, which having regard to the exigencies of the business and articles of association, may properly be left to some other official, he is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. ²⁶ The last mentioned case has been followed in an Oudh case,²⁷ wherein it has been held that it appears to be settled law that facts which show imprudence in the exercise of powers conferred upon directors will not subject them to personal responsibility, the imprudence must be so great as to amount to *grassa negligentia* (gross negligence) as 'for example' if they were cognizant, of circumstances of such a character so plain, as manifest and so simple in operation that no man with an ordinary degree of prudence acting on his own behalf would have

24. *Re City Equitable Fire Insurance Co. Ltd.*, (1925) 1 Ch. 407.

25. *Mohd Ismail & Co. v. Satchida Nand*, 40 C. W. N. 769.

26. *City Equitable Fire Insurance Co. in re.* (1925) 1 Ch. 407.

27. *S. C. Mitra, Liquidator, Bank of Oudh v. Nawab Ali Khan*, A. I. R. 1926 Oudh, 153.

entered into such a transaction as they entered into. But if they are authorised to do act in itself imprudent, they are not to be held responsible for the consequences of doing it nor are they liable for mere errors of judgment. Directors of a company acting within their powers and with reasonable care and honesty in the interests of the company are not personally liable for losses, which the company may suffer by reason of their mistakes or errors of judgment. Accordingly, if the directors act within their powers, if they act with such care, as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as legal duties to the company.²⁸ A director interested in the control or management of a company, even though acting honestly is not acting reasonably if he is blindly trusting a dishonest manager and would, therefore, be liable for negligence.²⁹

To sum up, the directors being in position of trustees in respect of company's assets in their hands or under their control, are bound to exercise the trust with fidelity and reasonable diligence. They must in doing so act with such care as is reasonably to be expected from them having regard to their knowledge and experience. They must act honestly for the benefit of the company they represent. They must use fair and reasonable care and diligence in the discharge of their duties. They are, however, entitled to trust officers of the company in regard to all duties which, having regard to the exigencies of the business, may properly be left to such officers and are not liable for fraud committed by their subordinates or other co-directors. They are not bound to attend all meetings of the Board of Directors though they ought to attend them when reasonably able to do so, nor are they bound to give continuous attention to the affairs of the company except at Board's meetings or at the meeting of any committee to which they are appointed. They are not bound to enquire into matters which are not brought before the Board of directors unless they are aware of the facts which make it their duty to enquire. Again they are not liable for mere errors of judgment. They may delegate their duties if so authorised by the Articles of the company, expressly or by implication.

(iii) Other statutory and miscellaneous duties.

(a) Duty to see that the company keeps proper books of accounts:—

S. 130 (1) of the Act provides that a company shall cause to be kept proper books of accounts with respect to (i) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place, (ii) all sales and purchases of the goods by the company, (iii) the assets and liabilities of the company. Such books of accounts must be kept at the registered office of the company or at such other place as the directors think fit and are open to inspection by the directors during business hours. In case of a branch office of the company, however, the books of accounts relating to the transactions effected at the branch office may be kept at the branch office concerned. In the last mentioned case proper summarised returns made up-to-date at intervals of not more than two months, must be sent by the branch office to the registered office of the company or such other place as the directors

28. *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392.

29. *Union Bank Ltd., Allahabad*, in re. A. I. R. 1926 All. 519 : 47 All 660

may, in their discretion, prescribe [vide S. 130 (3)]. Sub-section (4) of S. 130 casts a duty on the Managing Agent of the company, if the company is so managed, or where the Managing Agent is a firm or company, on the partners or directors of such firm or company, as the case may be, and in any other case on the director or directors of the company, to see that the provisions of S. 130 are duly complied with. The director or directors who have knowingly, by their act or omission, been the cause of any default in complying with the said requirements are liable in respect of such offence to a fine not exceeding one thousand rupees. Thus the sub-section impliedly enjoins every director of the company (except when the company is managed by a Managing Agent) to take all reasonable steps to secure compliance with requirements of S. 130.

(b) **Duty to call annual general meeting of the company:**—S. 76 of the Act requires a general meeting of every company to be held within 18 months from the date of incorporation and thereafter once at least in every calendar year and imposes upon the directors the duty of calling the same. The default in this respect is punishable under sub-section (2) of the aforesaid section.

(c) **Duties of directors as to Balance Sheet:**—The directors of every company shall at some date not later than 18 months after the incorporation of the company and subsequently once at least in every calendar year, lay before the company's general meeting a Balance Sheet and Profit and Loss Account made up-to-date not earlier than the date of the meeting by more than nine months or in case of a company carrying on business having interests outside British India by more than 12 months [Sec. 13.] The directors shall make out and attach to every Balance Sheet a report with respect to the state of the company's affairs or the amount, if any, which they recommend should be paid by way of dividend and the amount, if any, which they propose to carry to the Reserve Fund, General Reserve or Resevee Account to shown specifically on the Balance Sheet or to Reserve Fund, General Reserve or Reserve Account to be shown specifically in a subsequent Balance Sheet [Sec. 131-A]. But before presenting their Annual Report and Balance Sheet to their shareholders and before recommending a dividend the directors should have a complete and detailed list of the company's assets and investment prepared for their own use and information and ought not to be satisfied as to their value merely by the assurance of the chairman, however, apparently distinguished and honourable nor with the expression of the belief of their Auditor, however, competent and trustworthy. They are, however, not responsible for declaring a dividend unwisely. They are liable if they paid it out of the capital, but the onus of proving that they have done so, lies upon the person who alleges it. It is not for the directors to prove, especially after a lapse of a considerable time, that the dividends were in fact paid out of profits.³⁰ Declaration and distribution of dividend by blindly trusting a dishonest manager, when there are no profits to the company, amounts practically to a distribution of capital and makes the directors liable. But where a director of a joint stock banking company in assenting to the payment of dividend out of capital and to advances on improper security relied on the judgement, information and advice of the chairman and general manager of the bank, by whose statement he was misled and whose integrity, skill and competence, he had no reason of suspecting, it was held that he was not negligent of his duties. Lord Davey, during the course of his judgement in the case, observed at page 192 as under :

30. *Re. City Equitable Fire Insurance Co., Ltd.*, (1925) 1 Ch. 407.

"I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But, I think, he was entitled to rely upon the judgment, information and advice of the chairman and general manager, as to whose integrity, skill and competence he had no reasons for suspicion. I agree with what was said by Sir George Jessel in *Hallmark's case*⁸⁰ that directors are not bound to examine entries in the company's book. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from branches and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself notwithstanding that they were laid on the table of the board for reference."

(d) **Duty of directors as to allotment** :—It is the duty of the directors to allot shares on the best terms available and in so doing they must act *bona fide* in good faith in the best interests of the company, the powers of the directors in this respect being fiduciary ones.⁸¹ Accordingly where shares are issued by the directors improperly or for ulterior object, e.g. for increasing voting powers with a view to obtain the control of the company, or for the purpose of defeating the wishes of the existing majority, etc., the directors are guilty of breach of trust⁸². They must also comply with the provisions of sections 101 and 104 of the Act relating respectively to restrictions as to allotment and return as to allotment.

(e) **Duty as to enforcement of calls** :—It is *prima facie* the duty of directors to take all steps necessary for enforcing payment of calls and they would be guilty of breach of duty if they do not do so⁸³. In making calls the directors must exercise their powers for the benefit of the company and must comply with all formalities in this respect.

(f) **Duty as to filing annual list of members and summary** :—It is the duty of the company and its directors to forward the annual list of members and summary, as required by S. 32 of the Act, to the Registrar. Failure to do so means a *prima facie* breach of duty under the section aforesaid for which all the directors are liable [Sec. 32 (5)].

(g) **Duty to call extraordinary general meeting on requisition** :—Section 78 (1) imposes a duty upon the directors of a company having share capital, on the requisition of holder of not less than 1/10 of the issued share capital of the company, upon which all calls and other sums then due have been paid, to forthwith proceed to call an extraordinary general meeting of the company. If the directors do not proceed within 21 days from the date of requisition to cause a meeting to be called, the requisitionists or a majority of them in value may themselves call the meeting. [Sec. 78 (3)].

80. *Hallmark's case* (1878) 9 Ch. D. 329 and by Chetty, J. in *Re Denham & Co.* (1883) 25 Ch. D. 762.

81. *Shaw v. Holland*, (1900) 2 Ch. 305.

82. *Punt v. Symons & Co.*, (1903) 2 Ch. 506 and *Pierce v. S. Mills & Co.*, (1920) 1 Ch. 77.

83. *Spackman v. Evans*, L. R. 3 H. L. 171.

(h) **Duty of directors at the meetings of the shareholders :—**It is the duty of the directors to give information of all relevant facts to be discussed at a meeting of the general body of the shareholders. It is their duty to forward to the members of the company any reason which they think justified, the policy which the company, with their assistance, has adopted and to say to the members of the company, if they think so in good faith, that it is the best policy and are bound to do so, if it is attacked by a member. It is also their duty to take care that there is a sufficient number of shareholders put into a position to vote for those who are personally unable to attend the meeting³⁴.

(i) **Duty as to statutory meeting and report :—**Section 77 of the Act relates to statutory meeting of the company which must be held (except in the case of a private company) within 6 months from the date at which the company is entitled to commence business. Sub-section (2) of the aforesaid section imposes an obligation on the directors to send a statutory report to each shareholder at least 21 days before the date of the meeting, while sub-section (3) requires such report to be certified by not less than two directors of the company or by the Chairman of the directors if authorised in this behalf by the directors. Sub-section (5) of that section imposes upon the directors the obligation of sending the copies of the report to the Registrar for registration as soon as copies thereof have been sent to the members of the company. Sub-section (6) of that section requires the directors to cause a list of members showing certain particulars enumerated therein to be produced at the commencement of the meeting and to keep that list at the meeting available for inspection of the shareholders during the continuance of the meeting.

(j) **Duty to disclose interest :—**Sec. 91 A imposes upon every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company to disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists or in any other case at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement. The matter has been fully discussed under heading 'Disabilities in relation to contracts with Company'.

POWERS OF DIRECTORS

PROVISION OF POWERS IN THE ARTICLES

Compulsory inclusion of regulation 71 of Table A :—Articles usually confer powers on the directors specifically. In addition to them a general clause providing *inter alia* that directors may exercise all the powers of the company not by articles or by statute required to be exercised by the company in general meeting subject nevertheless to any regulation of the articles and to the provision of the Companies Act, was usually inserted in the articles of a company. Section 17(2) of the Indian Companies Act has now made the inclusion of regulation 71 of Table A compulsory in every articles of a company and even if the regulation aforesaid is not found in any of the articles, the articles shall nevertheless be deemed to contain that regulation by force of Section 17 (2) mentioned above. The aforesaid regulation lays as under :

34. *Peel v. London & North Western Railway Co.*, (1907) 1 Ch. 5.

The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting, but no regulation made by the company in general meeting, shall invalidate any prior act of the directors which would have been valid if that regulation had not been made."

Effect of such inclusion :—The effect of the inclusion of Regulation 71 in the articles of the company is to give the director whole powers of the company, subject to the provisions of the articles and of the Indian Companies Act. In *Patent Felle Co.*,¹ in re an article similar to regulation 71 of Table A of the Indian Companies Act, existed and it was held that in the absence of any prohibition in the articles, the company can secure a past debt by depositing title deeds, James, L. J. made the following pertinent observations:—

"It is equally plain that in these articles the directors can do anything which the company could do, unless it is an act which they are specially prohibited from doing. I can find nothing in the memorandum or articles to prevent the directors from making the best terms they can with a creditor of the company by selling or pledging part of the property of the company. No doubt a disposition of the property by the director might be void in equity if it were contrary to the objects of the company, the directors would then be restrained from doing the act, as being in abuse of the fiduciary position. But in the present case there is nothing to prevent the company from making such an arrangement as this with a creditor nor is there anything to prevent the directors from doing so."

Mellish, L. J., in the same case observed at page 88 as follows:—

"The articles give to the directors the whole powers of the company, subject to the provisions of the articles and Companies Act, 1862 and I cannot find anything either in the Act or the articles to prohibit their making a mortgage by deposit.....There being nothing in the articles to prohibit the giving of such a security, I am of the opinion that the company can give it as well for a past debt as for a future one."

In another recent case² article (117) exactly similar to regulation 71 of Table A existed and it was held that the said article (117) clearly delegated to the directors power to do everything that the company could do except where the authority of a general meeting of the company was expressly prescribed [and that such delegation would include power to issue preference shares.

Statutory restrictions on powers of directors :—The directors of a public company or of a subsidiary company of a public company cannot, except with the consent of the company concerned in general meeting, sell or dispose of the undertaking of the company or remit any debt due by a director (*Vide* Sec 86-H). The restrictions above mentioned do not, however, apply to private Company which is not a subsidiary company of a public company.

1. (1870) 6 Ch. A. 83.

2. *Campbell v. Rife* (1938) A. C. 91.

EXERCISE OF POWERS BY DIRECTORS CANNOT BE INTERFERED WITH BY SHAREHOLDERS

It is a first and elementary principle of Company Law that where the specific powers are vested in the directors by the Articles of Association of a company, the powers being delegated, reside with the directors exclusively and cannot be exercised or interfered with even by the majority of the shareholders as such. If the shareholders are dissatisfied with what directors do, their remedy is to remove them in the manner provided by the articles. But so long as the Board of Directors exists and particular powers are vested in them by the articles, then they are entitled to exercise those powers without interference by the shareholders and it is irrelevant whether the shareholders approve of what the directors have done or not² Even a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of company's affairs.⁴ In the last mentioned case, on the construction of certain articles of the company, it appeared that the shareholders had, by their express contract, mutually stipulated that their common affairs should be managed by the directors to be appointed by the shareholders in the manner described by other articles, such directors being liable to be removed only by a special resolution. At a general meeting of the company, a resolution was passed by a simple majority of the shareholders for the sale of the company's assets on certain terms to a new company formed for the purpose of acquiring them and directing the directors to carry the sale into effect. The directors being of opinion that a sale on those terms was not for the benefit of the company, declined to carry it into effect. It was held, on the construction of the articles, that directors could not be compelled to comply with the resolution. *Collin, M. R.*, in the course of his judgment in the case observed as follows (pp. 42 and 43) :—

“ In these circumstances it seems to me that it is not competent for the majority of the shareholders at an ordinary meeting to affect or alter the mandate originally given to the directors by Articles of Association. It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a director who is to manage him instead of his managing the agent. I think that that analogy does not strictly apply to this case. No doubt for some purpose directors are agents. For whom are they agents? You have, no doubt, in theory and law one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of the directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents. It is not fair to say that a majority at a meeting is for the purpose of this case the principal so as to alter the mandate of the agent. The minority also must be taken into account. There are provisions by which the majority may be overborne, but that can only be done by special machinery in the shape of special resolution. Short of that the mandate which must be obeyed is not that of the majority—it is that of the whole entity made up of all the shareholders. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves.”

3. *Hampson v. Prices Patent Candle Co.*, 24 W. R. 754 and *Jagdish Pershad v. Pars Ramo A. I. R.* (1941) All 360 (363)

4. *Automatic Self-Cleaning Filtered Syndicate Co. v. Cunningham*, (1906) 2 Ch. D. 34.

The above decision was referred to with approval in a later case⁵ wherein Buckley, L. J., has observed as follows (p. 106):—

“The directors are not servants to obey directions given by the shareholders as individuals: they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals. Of course the corporators have it in their power by proper resolutions which would generally be special resolutions, to remove directors who do not act as they desire.”

The law on the point has been correctly summarised by Geer, L. J., in a recent case⁶ as follows:—

“A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is, by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose action they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.”

Jurisdiction of the Courts to interfere with the exercise of powers by the directors:—As a general rule, the Courts seldom interfere with the internal management of a company.⁷ Accordingly, in the last mentioned case, the Court declined to direct the directors to convene a general meeting pursuant to a requisition where the directors, competent to convene such meeting, did not convene the same and the articles enabled the requisitionists themselves to call the meeting. The question of jurisdiction arose in a recent Calcutta Case⁸ in a suit for a declaration that the election of certain shareholders as directors, in a private limited company was valid and for an injunction restraining the co-directors from wrongfully excluding the plaintiffs from acting as such. Repelling the contention of the defendants that the Court had no jurisdiction to entertain the suit, it was held that the Court had jurisdiction to entertain the same for it was not a matter of the internal management of the company and, therefore, not excluded under the Indian Companies Act. The learned Judges who decided the case observed as follows:—

“As a matter of fact injunction may be granted on the application of a director restraining the plaintiff's co-directors from wrongfully excluding him from acting as a director and we think there is nothing which can be urged as excluding the jurisdiction of the Court from entertaining the suit. As we have said, this question of jurisdiction is quite different from the question whether the Court will exercise its discretionary jurisdiction having regard to the circumstances of a particular case.”

5. *Gramophone and Typewriters Ltd., v. Stanley*, (1908) 2 K. B. 89.

6. *John Shaw & Sons (Salford) Ltd. v. Shaw*, (1935) 2 K. B. 118 (194).

7. *MacDougal v. Gardiner* (1875) L. R. 10 Ch. A. 606.

8. *Sarat Chandra v. Tarak Chander*, 1. L. R. 51 Cal. 917.

The powers of directors being in their nature fiduciary they must always exercise them fairly and *bona fide* for the benefit of the company and Courts have sometimes interfered with the exercise of such powers to prevent their abuse.

INSTANCES WHERE COURTS HAVE INTERFERED

(i) **When shares not issued *bona fide* :—**Where shares were not issued *bona fide* for the general advantage of the company, but were issued with the immediate object of controlling the holders of the greater number of shares in the company, and of obtaining the necessary statutory majority for passing a special resolution, while, at the same time, not conferring on the minority the power to demand a poll, it was held that the directors ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used.⁹ The following observation of Byrne, J., in the aforesaid case (at p. 515) are worthy of note :—

"I am quite satisfied that the meaning, object and intention of the issue of these shares was to enable the shareholders holding the smaller amount of shares to control the holders of a very considerable majority. A power of this kind by the directors in the case, is one which must be exercised for the benefit of the company. Primarily it is given to them for the purpose of enabling them to raise capital when required for the purposes of the company. There may be occasions when the directors may fairly and properly issue shares in the case of a company constituted like the present for other reasons. For instance, it would not be at all an unreasonable thing to create a sufficient number of shareholders to enable statutory powers to be exercised; but when I find a limited issue of shares to persons who are obviously meant and intended to secure the necessary statutory majority in a particular interest, I do not think that is a fair and *bona fide* exercise of the power."

In *Fraser v. Whalley* quoted above the directors of a railway company acted on an old resolution which authorised the issue of shares for a particular purpose, though the particular purpose had ceased and they, being afraid that at a general meeting they would be removed, attempted to issue shares to enable them to be supported, and kept in office. The Court interfered on the above facts, to prevent a gross breach of trust; Page Wood, V. C. observed as follows in that case :—

"The directors are informed that at the next general meeting they are likely to be removed, and therefore, on the very verge of a general meeting they, without giving notice to any one, with this indecent haste and scramble which is shown by the times at which the meetings were held, resolve that shares are, on the faith of this obsolete power entrusted to them for a different purpose, to be issued for the very purpose of controlling the ensuing general meeting. I have no doubt that the Court will interfere to prevent so gross a breach of trust.....; but if the directors can clandestinely and at the last moment, use a stale resolution for the express purpose of preventing the free action of the shareholders, this Court will take care that, when the company cannot interfere, the Court will do so."

Both the cases referred to above were later on followed in *Pierce v. S. Mills & Co.*¹⁰

(ii) **Abuse of power to forfeit shares :—**The Court has interfered to prevent the abuse of power of forfeiture where such power was not exercised *bonafide* by the directors.

9. *Punt v. Symons & Co, Ltd.*, (1903) 2 Ch. 506, following *Fraser v. Whalley* (1864) 2 H. and M. 10.

10. *Pierce v. S. Mills & Co*, (1920) 1 Ch. 77.

in the interests of the company but was exercised merely to enable a shareholder to escape liability¹¹.

(iii) **Resolutions inconsistent with articles** :—Where the resolutions of the directors, though confirmed in general meeting of the company by a simple majority of shareholders, were inconsistent with the provisions of the articles, it was held that the company must be restrained from acting upon them.¹²

(iv) **Abuse of power of making calls** :—Where directors required other applicants for shares to make payments on application and allotment, and issued their own shares for which they had subscribed the memorandum without requiring any such payments to be made and without disclosing to the other shareholders this difference between their position and that of the directors, it was held that they committed a breach of duty, even though in so doing they acted without fraud, and in the belief, that they were doing nothing wrong¹³. The Court interfered on the principle laid down in *Gilbert's case*¹⁴ that a director cannot use his power of making calls for his own interest.

The following observations of Lindley, J., in the aforesaid case are worthy of note :—

“The Court of Chancery has always exacted from directors the observance of good faith towards their shareholders and towards those who take shares from the company and become co-adventurers with themselves and others who may join them. The maxim “*Caveat emptor*” has no application to such cases, and directors who use their powers so as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits and must account for them to the company so that all the shareholders may participate in them.”

In *Gilbert's case* referred to above, on 17th of April, the directors agreed to make a call in order to prevent the transfer of numerous shares which was threatened by some of the shareholders, but the declaration of the call was postponed until 23rd, when it was formally made. On the 18th April, one of the directors transferred some of his shares to his clerk, under circumstances which showed that he did so to escape liability, and the transfer was left for registration on the same day and registered on the 20th, the other directors being cognizant of the transaction. The company was subsequently wound up. It was held, in these circumstances, that inasmuch as it appeared that the formal declaration of the call had been postponed in order to assist the transferor in getting the transfer registered, the registration was void and the transferor was to be put on the list of contributories in respect of the shares. Giffard, L. J., in this case, observed as follows :—

“Here were directors who had what was unquestionably a discretion to exercise with reference to a fiduciary power, namely, a power to decide whether at a particular time a call ought or ought not be made, and if at a particular time, namely, on the 17th April, they had exercised that discretion by saying that a call should be made, then, beyond all question,

11. *Richmond's case* and *Painter's case*, (1858) 4 K. and J. 305 (325).

12. *Fuir and Artens Ltd., v. Salmon* (1909) A. C. 442.

13. *Alexander, Automatic Telephone Co.* (1900) 2 Ch. 56.

14. 5 Ch. A. 569.

the shares could not have been transferred as they have been.....I have no hesitation in saying that I can find but one reason why the directors did not make the call on that day, and that reason was that their duty and their interests lay in totally opposite directions; and if persons having to exercise a fiduciary power choose to place themselves in this position, that their interests pull one way while their duty is plainly to do something quite different, and for that reason they abstain from exercising that power, they must be held to all the consequences as though that power had been exercised."

(v) **Arbitrary and capricious refusal to register transfers of shares :—**

Where there is evidence to show that directors who had power to refuse to register transfer of shares have exercised that power capriciously or unfairly, the Court has jurisdiction to interfere and would interfere. But if the directors have *bona fide* considered the question at a meeting of the board and have acted reasonably, the Court would not interfere with their discretion, and they are not bound to disclose their reasons for rejecting a transfer¹⁵.

The law on the subject has been ably summed up on page 139 of the Buckley's famous commentary on Companies Act [11th Edition] as follows :—

"Where the articles authorize the directors to reject transfers to transferees of whom they do not approve, the directors must, before rejecting a proposed transferee, fairly consider the question at a board meeting. Provided that they do so, however, they are not bound to disclose their reasons for rejecting any particular individual, as to compel them to do so would be to deprive the power of half its efficacy. In the absence of evidence to the contrary, the Court will assume that they have acted reasonably and *bona fide*, and it is for those who allege that they have not done so to give evidence to that effect. It is, however, permissible to interrogate as to which of two or more grounds for rejecting transfers the directors have acted upon in rejecting the transfer, as distinguished from their reasons for so doing. If the directors do give their reasons, the Court will then consider whether they are legitimate or not, i.e., whether the directors have proceeded on a right or wrong principle, and will overrule their decision, if their reasons are not legitimate, but not, if they are legitimate, merely because the Court would not have come to the same conclusion. The Court will also overrule the directors' decision where, although they have given no reasons, it is proved that they have acted on a wrong principle or otherwise than *bona fide*. The principles applicable are exactly the same whether the power of rejecting transfers is absolute or limited to particular grounds."

Chandra Pekara Iyer, J., in a recent Madras Case¹⁶, while quoting with approval a part of the passage referred to above has made the following pertinent observations in this connection :—

"The right of transfer is absolute as it is inherent in the ownership of shares, but it can be restricted by contract which has to be found in the Articles of Association. Even in the case where the power to refuse registration is conferred in absolute terms the refusal must not be arbi-

15. *Gresham Life Assurance Society v. Harpate Perny*, (1872) L. R. 8 (h. A. 446.

16. *Thanappa Chettyar v. Indian Overseas Bank Ltd.*, A.I.R. (1948) Mad. 743 ; (1948) Com. Case 202 (208)

be rectified. In the last mentioned case one of the articles of the company empowered the directors in their absolute and uncontrolled discretion to refuse to register any proposed transfer of shares even in a case where the proposed transferee was already a member. It was held in that case that when the consent of directors is withheld for the reasons which do not stand scrutiny and no objection is raised of a personal kind against the transferee, to recognise the power in the directors to refuse the transfer is to countenance an abuse of power vested in them.

ACTS OF DIRECTORS IN EXCESS OF THEIR POWERS

Ultra Vires Acts :—Acts done or contracts made by directors in excess of authority are termed as *ultra vires* of the directors. An instance of such an act is borrowing by the directors beyond the limit of their borrowing power. The company is not bound by such unauthorised acts or contracts except in circumstances hereinafter mentioned. The law on the point has been stated by Kanhaiya Lal, J., in *Ram Bavan v. Mufussil Bank Ltd.*,¹⁷ as follows :

“The authority of the directors is defined by the Memorandum and the Articles of Association, and they have no power to go beyond the authority given to them, or to undertake any transaction outside the scope of the business of the company. They have power to carry on the business of the company in accord with the provisions therein contained, and if they do anything beyond the scope of the business of the company, their act is *ultra vires* and void, as the company would not be bound by any act done by directors for objects, which the company has no power to entertain. But not only do the acts of the directors bind the company, when done within the scope of their authority, but also where the acts of the directors, however irregular, belong to a class of acts, which is authorised by the constitution of the company. A company is bound by its dealings with strangers who act *bona fide* with the company; for says Grant, a company is liable for all acts done by its directors, even though unauthorised by it, provided such acts are within the apparent authority of the directors and not *ultra vires* the company.”

The directors have, in certain cases, however, been held personally liable for such *ultra vires* acts, on the ground of the breach of warranty of authority, the principle underlying being that when a person purports to act as agent, he promises or warrants that he is what he represents himself to be, and can be sued on the promise or warranty, although he has believed it to be true. The leading case on the point is *Collin v. Wright*¹⁸, a case of an agent professing to act for a third party, by whom he has not been authorised, but, who, so professing honestly induces somebody else to contract with him as the agent that he professes to be. Willes, J., who delivered the judgment in that case observed as follows :

“The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorised, that the authority which he professes to have, does in point of fact exist.”

17. 88 I. C. 142 (All.)

18. (1867) 8 E. & B. 647.

The effect of the aforesaid decision in *Collin v Wright* has been further explained by Lord Esher in *Firbank's Executors v. Humphreys*¹⁹ a case in which directors of a railway company were sued for having issued debenture stock in excess when they had no authority to do so, in the following terms :

"The rule to be deduced is, that where a person by asserting that he has the authority of principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damages that have occurred."

Collin v. Wright has been followed in *Oliver v. Bank of England*²⁰ wherein it has been held that the rule in the aforesaid case is not limited to a case where the person professing to have authority as an agent purports to make a contract on behalf of his alleged principal, but that it extends to any case where a person professing to have authority as agent induces another to act in a matter of business on the faith of his having that authority. The rule extends even to cases where the supposed agent did not know that he had no authority and had not the means of finding it out [*Starkey v. Bank of England*²¹ quoted with approval in *Yonge v. Toynbee*.²²] In the last quoted decision (*Yonge v. Toynbee*), the following observations of Buckley, L. J., are worthy of note :—

"The result of these judgments is that the liability of the person who professes to act as agent arises (a) if he has been fraudulent ; (b) if he has, without fraud, untruly represented that he had authority when he had not, and (c) also where he represents that he has authority where the fact is either (1) that he had never had authority or (2) that his original authority has ceased by reason of facts of which he has not knowledge or means of knowledge, such last mentioned liability arises from the fact that by professing to act as agent he impliedly contracts that he has authority, and it is immaterial whether he knew of the defect of his authority or not."

Acts *ultra vires* the directors but *intra vires* the company may be ratified by shareholders.—The acts of directors in excess of their authority, but *intra vires* the company as being within its scope, may be ratified by the company and rendered binding thereon, and they may be so ratified by a majority of the shareholders present at an extraordinary meeting of the company convened for that object, and of which object due notice had been given. The ratification at a half yearly meeting of a particular act of the directors in excess of authority would not, however, extend the authority of directors so as to authorise them to do similar acts in future. [*Irvine v. Union Bank of Australia*.²³] A meeting of the directors might well be considered a general meeting of the company, if all the members of the company happened also to be its directors and were present thereat and had unanimously assented to the act or transaction alleged to be *ultra vires* the directors, where there was no allegation of fraud, for a company is bound in matters

19. (1886) 18 Q. B. D. 54 (60).

20. (1902) 1 Ch. 610.

21. (1908) A. C. 114 (119).

22. (1910) 1 K. B. 215 (227).

23. (1877) 4 I. A. 86.

intra vires by the unanimous agreement of its members [*Express Engineering Works Ltd., in re*²⁴.] The last mentioned case was considered, explained and applied in *Parker etc., v. Reading*²⁵ wherein it has been re-affirmed that if all the individual corporators in fact assent to a transaction that is *intra vires* the company, though *ultra vires* the board, it is not necessary that they should hold a meeting in one room or one place to express that assent simultaneously. The following remarks of Astbury, J., in his judgment are worthy of note :—

“ Now the view I take of both these decisions is that where the transaction is *intra vires* and honest, and specially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least that assent is given at different times or simultaneously.....If the company law enables the entirety of the corporators to ratify an irregular *intra vires* transaction, why should this not protect an honest *bona fide intra vires* transaction entered into for the benefit of the company ?”

Requisites of valid ratification of an *ultra vires* act :—There can, however, be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act, without the knowledge of the illegality. To render a contract, *ultra vires* the directors but *intra vires* the company, valid the acquiescence of all the shareholders must be of the same extent as the consent which would have given validity from the first, *viz.*, the acquiescence of each and every member of the company and this acquiescence cannot be presumed unless the knowledge of the transaction is brought home to every one of the remaining shareholders. By the knowledge of the transaction is meant the knowledge of the invalidity of the transaction.²⁶

MODE OF EXERCISE OF THEIR POWERS BY DIRECTORS

As pointed out under the heading “Meeting of Board of Directors.” the directors are competent to act only when they are assembled together at the board meeting and it is not sufficient to procure a separate authority of a sufficient number of the directors to constitute a quorum,²⁷ unless the regulations of the company otherwise provide. The directors may appoint one or more of their number to act as a committee for special purposes and may delegate to such committee such of their powers as they may choose to delegate. Again some of their duties may be delegated to the Managing Agent or Managing Director, who under the control of the Board of Directors may be and is usually responsible for the routine management of the affairs of the company.

RIGHTS OF DIRECTORS.

There is no hard and fast line between the powers of directors and their rights and in most cases such powers and rights overlap each other. The following are, however, some of the instances of the rights of Directors :—

(i) **Right to management of company :—**The business of the company is managed by the directors, who may pay all expenses incurred in getting up and registering

24. (1929) 1 Ch. 466.

25. (1926) 1 Ch. 975.

26. *Primsa Devi v. People's Bank of Northern India*, (1939) 9 Com. Cas. 1 (P. C.).

27. *D's Arcy v. Tamra, etc., Company*. L. R. 2 Ex. 156.

the company and may exercise all such powers of the company as are provided by the Indian Companies Act, 1913 or any statutory modification thereof for the time being in force, or by the Articles of Association, required to be exercised by the company in general meeting. Thus they have the right to exercise the whole of the powers of the company subject to the provisions of the Articles of Association and of the Indian Companies Act. This has been discussed above at length under the heading 'Provision of powers in the articles.'

(ii) **Right to attend board meeting:**—The directors have a right to attend the meeting of the board and are entitled to receive due notice thereof. This right arises out of the right to manage the affairs of the company. The articles usually provide for the period of notice of the board meeting and as to how it is to be given. In some cases they also provide for publication of the agenda of the meeting proposed to be convened beforehand. In the last mentioned case the holding of the meeting without publication of the agenda in the first instance as provided by the articles, would render the meeting invalid.

(iii) **Right to inspect the books of account of the company:**—Sub-section (2) of S. 130 gives the directors a statutory right of inspection of the books of account of the company during business hours. The ordinary common law right which a director had to see such books and other documents of the company at all times has in a way been curtailed by the section aforesaid. Reference in this connection may be made to *Burn v. London and South Wales Coal Company*.²⁸

(iv) **Right to contract with the company:**—The directors stand in a fiduciary relationship with the company and consequently they cannot, in the absence of express provision to that effect in the articles, contract with the company.²⁹ The rule above mentioned is based upon the principle that no person acting as an agent can be allowed to put himself in a position in which his interest and duty will conflict.³⁰ A company may, however, waive the benefit of this restriction. An article is usually found in the Articles of Association of the company that the director may contract with the company and in the last mentioned case the directors had right to contract with the company though it would still be incumbent on them to disclose their interests to the Board as contemplated by S. 91-A of the Indian Companies Act.

(v) **Right to recommend dividend:**—The Directors have a right to recommend the amount which they decide should be paid by way of dividend. S. 131-A *inter alia* provides that the directors shall make out and attach to every balance sheet a report with respect to the state of the company's affairs containing their recommendation as regards the dividends to be declared for being placed before the general meeting for the acceptance of the shareholders. The mere recommendation of dividends by directors will not give any cause of action to the shareholders though once the dividend is declared the amount to be paid as such becomes a debt, and, unless paid, entitles the shareholders concerned to sue the company for such amount.³¹

28. 1890 W. N. 209.

29. *Albion Steel etc., Company v. Martin*, 1 Ch. D. 580.

30. *Parker v. McKenna*, 10 Ch. A. 96.

31. *Bond v. Barrow Hematite Steel Co.*, (1902) 1 Ch. 858.

(vi) **Right to indemnity:**—Directors being both agents of and trustees for the company are entitled to be indemnified by the company against all losses and expenses properly sustained and incurred by them in due performance of their office. Their right to indemnity arises by the implications of a contract from the relation between themselves and the company, and therefore depends on the particular relation existing, for different contracts are implied from different relations.³² The general principle is that a master is bound to indemnify his servant for all expenses incurred or loss sustained in obeying his lawful order.³³ It is a well settled rule that an agent has a right against principal founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed for all expenses incurred by him in the execution of his authority.³⁴ No indemnity can, however, be given against any liability in respect of any negligence, default, breach of duty or breach of trust of which a director may be guilty in relation to the company. S. 86 C of the Act recently introduced by the Amending Act of 1936 is intended to avoid such as provision in the articles or in any contract for an indemnity. It has been usual for the companies to make provisions in the most general terms with a view to indemnify the directors and other officers of the company against all expenses or losses which they may incur or become liable to by reason of any contract entered into, or act or acts done by them as such officers or servants or in any way in the discharge of their duties. Such provisions must now be read in the light of and subject to S. 86 C.

The proviso (c) to the aforesaid section, however, provides that where there is an indemnity clause in the articles, the company may notwithstanding the provision in S. 86 C indemnify a director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under S. 281 of the Act in which relief is granted to him by the Court.

32. *Young v. Naval Military and Civil Service Co-operative Society*, (1905) 1 K. B. 687 (698).

33. *Macdonell on Master and Servant* 11 Ed. 144.

34. *In re Farnetina Development Corporation Ltd.*, (1914) 2 Ch. 271 (at page 282) C. A. .

CHAPTER XV

DIRECTORS

LIABILITIES OF DIRECTORS

The liabilities of directors are intimately connected with their duties. Reference may, therefore, be also made to the "Duties of the directors" discussed in Chapter I of this part. The liabilities of directors may be divided under several distinct heads namely, their liabilities to outsiders, to shareholders, and to the company.

LIABILITIES TO OUTSIDERS

(a) **As to contracts.**—The liabilities of directors to the outsiders as to contracts are governed by the ordinary law of the principal and agent. The directors as agents of the company, are not, therefore, liable to outsiders for the acts or defaults of the company. Section 88 of the Indian Companies Act, makes all contracts entered into on behalf of the company, by person duly authorised by it, expressly or by implication, binding on the company and its successors. Likewise, section 89 makes bill of exchange, hundi or promissory note, drawn, accepted or endorsed on behalf of the company, binding on the company if made, drawn, accepted or endorsed in the name of, or by or on behalf of or on account of the company by any person acting under its authority, express, or implied. In making such bill of exchange, however, the directors must be careful that the conditions of section 89 aforesaid are complied with and it is not drawn in such a form as may pledge their personal credit. The two conditions contemplated by the aforesaid section are:—

(1) The bill of exchange, hundi or promissory note must have been made drawn, accepted or endorsed in the name of the company, or by or on behalf of the company and (2) it must be so made, drawn, accepted or endorsed by a person acting under its authority, express or implied. This is of the utmost importance that the name of the company to be charged upon the negotiable instrument should be clearly stated on the document, so that the responsibility is made plain and can be instantly recognised, Per Lord Buckmaster in *Salasuk v. Krishna Prasad*.¹ A person signing a negotiable instrument as drawer, endorser or acceptor and adding words to his signatures, indicating that he signs for and on behalf of a principal or in any representative character is not personally liable thereon, but the mere addition to his signature of words describing him as an agent or as filling the representative character does not exempt him from liability [Section 26 (1) of the Bill of Exchange Act 1882 (45 and 46 Vict) C. 61].

In a recent Calcutta case² where certain hundis drawn in favour of Mitra & Sons, who were the Managing Agents of Lister Antiseptic Dressing Co. Ltd., were endorsed by the former at the back as follows:—“Mitra & Sons, Managing Agents, Lister Antiseptic Dressing Co. Ltd.,” it was held that the words “Mitra & Sons, etc.,” were merely descriptive of the firm aforesaid and did not bind the company as they did not indicate that

1. 46 I A. 33 (30).

2. *Shree Lal Manglu Lal v. Lister Antiseptic Dressing Co. Ltd.*, 1. L R. 52 Cal 802.

the instruments were endorsed by or on behalf of the company. But where a managing director of a company executing a promote in the following term "I promise to pay" and, signed it as "J. H. Smethurst's Laundry Ltd., J. H. Smethurst, Managing Director" it was held that the director was not personally liable thereon³.

In the last mentioned case Lord Justice Kennedy has laid down the following test :

"The proper test to comply in such cases is laid down in Lindley on Companies, 6th Edition, Vol. 1, at page 285, where it is said : The question is in every case one of construction. Is the bill or note of the company or not ? Does it really purport so to be, for although good for the purposes of the company the bill or note may not have been purported to bind it ? If on the true construction of the instrument the bill or note is bill or note of the company, the company will be liable upon it and not the individuals whose names are on it unless the bill or note is the bill or note of both. On the other hand, if on the true construction of the bill or note it is not a bill or note of the company, the persons whose names are upon it will be liable upon it, whether they intended to be so or not."

But where the directors executed a promote thus "we the directors of A. B. Co. promise to pay" and signed the same, it was held that they were personally liable thereon although the company also executed the promote.⁴ Again where the directors contract in their own names without disclosing that they are acting for the company, they would be personally liable. The test of liability is, does it appear from the term of the contract that the directors were contracting on behalf the company? If it does, they are protected.⁵

Accordingly in a Bombay case⁶ where one of the secretaries, treasurers, and agents of a company signed a promote in his own name for the price of machinery purchased by the defendant company and the promote aforesaid was written on a form of letter of the company and bore a rubber stamp impression of the company, it was held that the promote was signed on behalf of the company and the company was consequently liable thereon, Macleod, C. J., made the following pertinent observations during the course of his judgment :—

"The only question is whether it can be said that this promote has been drawn on behalf of the company and for that purpose we must look at the contents of the note and we find that at the top of the note, the heading "Gajanan Industrial Trading Co., Ltd., Wai," and there is a rubber stamp which was evidently used as the stamp of the company in addition. There can be no doubt that the secretaries, treasurers and agents signed the promote on behalf of the company, and there is no reason for dismissing the claim because the stamp appears at the top of the paper, instead of, beneath the signature. The company, undoubtedly, purchased the machinery, used the machinery, and was liable to pay for the machinery."

Liability of directors for their *ultra vires* acts:—A contract *ultra vires* the company is wholly void. It is neither binding on the company nor its directors and cannot, therefore, be enforced. But in such a case the directors may be made liable for an implied breach of warranty. The directors have in such case been held personally

3. *Chapman v. Smethurst*, (1909) K. B. 927.

4. *Dutton v. Marsh*, (1871) 6 Q. B. 361.

5. *F. Stacey & Co. v. Wallis*, 106 L. T. 544 and *Okkel v. Charles*, 34 L. T. 822.

6. *Poona Chitrashala Steam Press v. Gajanan Industrial Trading Co.*, 24 B. L. R. 335.

liable for such *ultra vires* acts. The principle underlying being that when a person purports to act as agent, he promises or warrants that he is what he represents himself to be and can be sued on the promise or warranty although he believed it to be true.⁷ For further discussion on the point, reference may be made to "Acts of directors in excess of their powers" *supra*.

Company when bound by *ultra vires* acts of directors :—The company may, however, be bound by certain *ultra vires* acts of directors so long as those acts are within their ostensible authority, for an outsider is entitled to assume that the directors are acting regularly, when he has no means of knowing of the internal irregularity in the management.⁸ The following observations of Kanhaya Lal, J. in an Allahabad case are pertinent in this connection :—

"Not only do the acts of the directors bind the company when done within the scope of their authority, but also where the acts of the directors, however irregular, belong to a class of acts, which is authorised by the constitution of the Company. A company is bound by its dealings with strangers who act *bona fide* with the company ; for says Grant, a company is liable for all acts done by its directors, even though unauthorised by it, provided such acts are within the apparent authority of the directors and not *ultra vires* the Company⁹ and persons dealing *bona fide* with a managing director are entitled to assume that he has all such powers as he purports to exercise if they are powers which, according to the constitution of the company, a managing director can have.¹⁰ All persons dealing with a company must ascertain the limitations imposed by the Articles of Association, but they are not bound to draw any direct or obvious inferences from the provisions they find there, nor is there any obligation cast upon them to see that such Directors are properly appointed or that they have acted exactly in accordance with the manner prescribed therein.¹¹ The Articles of Association of the company define the powers of directors as between themselves and the company, and unless there is anything in those articles limiting the powers of the Board of Directors in carrying on the ordinary business of the Corporation, a third party who deals with the directors or with the managers acting under those powers, however irregularly, is protected if he acts in good faith in his dealing with them."¹²

(b) **As to tort :—**The directors would be personally liable for wrong done to outsiders. In actions for such tortious acts they cannot plead that they were agents for the company, the principle being that the person committing a wrong is himself liable therefor, and is nonetheless so if he was acting as an agent or servant on behalf and for the benefit of another.¹³ But a director is not liable for the fraud of co-directors, unless he has expressly or impliedly authorised it.¹⁴

7. *Collen v. Wright*, (1857) 8 E. and B. 647.

8. *British Thompson Houston Co. Ltd. v. Federated European Bank Ltd.*, (1932) 2 K. B. 176; *Mercantile Bank of India v. Chartered Bank of India, Australia and China*, (1937) All. E. R. 27 and *County of Gloucester Bank v. Rudry Merthyr Steam & Colliery Co.*, (1895) 1 Ch. 629.

9. *Ashbury Railway Carriage & Iron Co. v. Hector Ritchie*, (1875) 7 H. L. 653.

10. *Bigger Staff v. Rowntree's Wharf Ltd.*, (1898) 2 Q. B. 115.

11. Grant's Law of Banking, 6th Edition, para 607.

12. *Ram Baran Singh v. Mufassil Bank Ltd.*, 88 Indian Cas. 142.

13. *Cullen v. Thompson Trustees*, 4 Macq. 424 (422).

14. *Cargill v. Bowes*, (1878) 10 Ch. D. 502.

False statement in prospectus :—The issue of fraudulent prospectus is a tortious act making directors responsible therefor personally liable. Section 93 of the Act requires certain particulars mentioned therein to be stated in the prospectus, while section 100 makes every director liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all losses and damages they may have sustained by reason of any misleading or any untrue statements therein, of any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith unless it is proved :—

- (a) With respect to every misleading or untrue statement, not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did, up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true ;
- (b) With respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of extract, from a report or valuation of an expert, that it fairly represented the statement or was a correct and fair copy of or extract from the report or valuation ; provided that the director, person named as director, promoter, or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it ; and
- (c) With respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy or extract from the document :

or unless it is proved—

- (i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and it was issued without his authority or consent ; or
- (ii) that the prospectus was issued without his knowledge or consent and that on becoming aware of its issue he forthwith gave a reasonable public notice that it was issued without his knowledge or consent ; or
- (iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

In a recent Madras case¹⁵ it appeared from evidence on record that the directors of a company issued a prospectus which contained a representation that a certain government had agreed to encourage the company by giving a steady and continuous supply of timber required for the purposes of the company, whereas in fact the government had only held out a conditional promise dependent upon the first year's transaction being mutually satisfactory, and the plaintiff took shares on the faith of his representation. In

15. *Manavedan Tirumalpad v. Amir Chand Doss*, (1944) 14 Com. Cas. 125.

a suit by the plaintiff against the director of the company for damages it was held that in the circumstances of the case, the representation referred to, which was contained in the prospectus, was false and the directors were liable. It was, however, held that the suit was barred under Act. 36 of the Limitation Act having been instituted beyond two years from the date of accrual of cause of action, namely, tortuous act of the directors, which was independent of the contract as evidenced by the allotment of shares and arose long before it.

Besides for wrong statements in prospectus as also for wilful omission of facts required to be stated therein, directors responsible therefore may be proceeded against under section 97 of the Indian Companies Act. The last mentioned section deals with non-compliance with the provisions of section 93 of the Act and provides penalty therefor. It runs as follows :—

"S. 97 (1) If a prospectus is issued which does not comply with the provisions of Section 93, every person who is knowingly responsible for the issue of such prospectus shall be liable to a fine not exceeding fifty rupees for every day from the day of the issue of the prospectus until a copy complying with the requirement of S. 93 is filed.

(2) In the event of non-compliance with or contravention of any of the requirements of S. 93, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention if he proves that :—

- (a) as regards any matter not disclosed, he was not cognisant thereof ; or
- (b) the non-compliance or contravention arose from an honest mistake of fact on his part ; or
- (c) the non-compliance or contravention was in respect of matters which in the opinion of the court were immaterial or was otherwise such as ought in the opinion of the Court having regard to all the circumstances of the case reasonably to be excused.

Provided that, in the event of non-compliance with or contravention of the requirements contained in clause (n) of sub-section (1) of S. 93, no such director or other person shall incur any liability in respect of the non-compliance or contravention unless it be proved that he had knowledge of the matters not disclosed."

LIABILITIES TO SHAREHOLDERS

An individual shareholder cannot proceed against the directors to make good the losses sustained by the company by reason of their fraudulent acts, the reason being that the Court will not interfere in the internal affairs of the company, where there is nothing *ultra vires* the company. Accordingly, where certain acts of director alleged to be fraudulent were not *ultra vires* the company but were capable of confirmation by the majority, the Court refused to interfere leaving to the majority to complain or condone as they might think fit.¹⁶

The wil of the majority is ordinarily the will of the company in such a case. Where the acts complained of can be ratified by the majority there is nothing for which the com-

16. *Foss. v. Harbottle* (1843) 2 Hare 461.

pany can sue. The rule that it is the company which must decide whether the litigation should be undertaken, ought, therefore be limited to cases where the act complained of is ratifiable (I. L. R. 1938, 1 Cal. 90); for no majority of shareholders can sanction that which is *ultra vires* the company.¹⁷

Suit by shareholders—form of and parties thereto—It is the general rule that an individual shareholder is not competent to make use of the name of the company as a plaintiff in an action, and the rule is the same with regard to a number of the shareholders. Before they can institute a suit in the name of the company, such shareholders must say either that they have been authorised by the company at a general meeting of the company to institute the suit or that they have exhausted all reasonable means of obtaining the institution of the suit by the company, or that the case is one of urgency in which latter event they institute the suit at their peril and subject to their being able to satisfy the Court that they have the support of the majority, [46 P. R. 1911]. The court, may, with a view to ascertain as to whether the plaintiff using the name of the company does in fact represent the majority of the company or whether it is the defendant party which really represents, that majority, direct a meeting to be called.¹⁸

Exception to the above rule :—To the above rule there are, however, certain well recognised exceptions. The Courts have, for instance in certain cases, e.g., where the acts complained of are *ultra vires* or fraudulent or where such acts are a fraud on the minority, allowed the minority to bring an action in the name of the complaining shareholders.¹⁹

Where the act complained of is *ultra vires* the company the Court interferes because the act in question is not an act within the constitution.²⁰ Likewise where the act complained of is a fraud on the minority the Court interferes on the ground that the majority cannot be permitted to commit a fraud on the minority.²¹

Cases generally known as fraud on minority :—In the class of cases referred to generally as cases of fraud upon the minority if the wrongdoer has the support of majority therefor the company does not take action, there are courses open to the shareholders in fact minority. They may take the risk of boldly using the company's name. The other course and what has been thought to be the better one, is for the minority shareholders to sue in their own names or, as a matter of convenience for a shareholder to sue on behalf of himself and all the other shareholders. If however, as generally happens and must happen logically the wrongdoers are also shareholders, these shareholders as a matter of course must be excluded from the category of the plaintiff; and hence the phrase (except those who are defendants). In a suit so brought, the complaint is said to be a fraud on the minority. In such an action it is not sufficient to plead simply the dominance of the majority of shareholders or what is called the secondary fraud but the primary fraud which is the gist of the action, must clearly be indicated, although no doubt the pleadings or particulars may be so framed as to stress

17. *Bourland v. Earl* (1902) A. C. 83.

18. *Mag Dougall v. Gardner* 1 Ch. D. 22 and *Pender v. Lustington* (1877) 6 Ch. D. 70.

19. *Atwool v. Merry Weather* 1868 L. R. 5 Eq. 464 and I. L. R. (1938) 1 Cal. 90.

20. *Jhajharia Boser v. Sholapur S. and W. Co.*, (1941) 11 Com. Cas. 180.

21. *Menieu v. Hoppers Telegraph Works*, (1874) L. R. 9 Ch. A. 350 and *Bourland v. Earl* (1902) A. C. 83.

the dominance of the majority and the effectuation of the fraud through that dominance. Where a decision of the director is attacked on the ground that it is injurious to the company, the directors should be parties. Where the act of directors so impeached has been confirmed and is still impeached on the basis that directors have got that confirmation by controlling the majority, still those directors should be parties, as it is not sufficient to allege fraud against, so to speak, persons unknown or rather to allege it generally against the company and not against specific persons who must be made parties to the suit.²⁰ In such an action the plaintiff should distinctly allege the illegality of the act complained of and the impossibility of getting the company to impeach its validity. [I. L. R. (1938) 1 Cal. 90].

LIABILITIES TO THE COMPANY

(i) **Liability for negligence** :—So long as a director acts honestly he cannot be made responsible in damages, unless he is guilty of gross or culpable negligence in a business sense.²² One cannot, however, say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of the duty which he is alleged to have neglected.²³ As a general rule, a director need not exhibit, in performance of his duty, a greater degree of skill than may reasonably be expected from a man of his knowledge and experience. A director of a Life Insurance Co., does not, for instance, guarantee that he has the skill of an actuary or of a physician.²⁴ The general rule is that if the directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, the discharge both their equitable as well as their legal duties to the company.²⁵ The proper test to apply in such cases is whether or not the directors exceeded the powers entrusted to them or whether if they did not so exceed their powers, they were cognizant of circumstances of such a character, so plain, so manifest and so simple of appreciation that no man with any ordinary degree of prudence acting on his own behalf, would have entered into such a transaction as they entered into.²⁵

The directors are not, therefore, liable for mere errors of judgment.²⁴ It appears to be settled law that facts which show imprudence in the exercise of powers conferred upon the directors will not subject them to a personal responsibility; the imprudence must be so great as to amount to a *grossa negligentia* (gross negligence), as for example, if they were cognizant of circumstances of such a character, so plain, so manifest and so simple in operation that no man with any degree of prudence, acting on his own behalf, would have entered into such a transaction as they entered into. But if they are authorised to do an act in itself imprudent, they are not to be held responsible for the consequence of doing it, nor are they liable for mere errors of judgment. Directors of a company acting within their powers and with reasonable care and honesty, in the

22. Per Romer, J., in *City Equitable Fire Insurance Co.* (1925) 1 Ch. 407.

23. Per Neville, J., in *Braslian Rubber Plantation & Estate Ltd.*, (1911) 1 Ch. 425.

24. Per Lindley, M. R., in *Laguna Nitrate Co v. Lagunas Syndicate* (1899) 2 Ch. 392.

25. *Overend Gurney & Co. v. Gibb* (1872) 42 L. J. Ch. 67.

interest of the company, are not personally liable for losses which the company may suffer by reason of their mistakes or errors of judgment.²⁶

The liabilities of directors are co-related to their duties as such, for it is only the breach of such duties which leads to their liabilities. The following propositions laid down in the leading case of *City Equitable Fire Insurance Co.*,²⁷ should therefore, be carefully borne in mind :—

“In discharging his duties, a director (a) must act honestly; (b) must exercise such degree of skill and diligence as would amount to the reasonable care, which an ordinary man might be expected to take in the circumstances on his own behalf; but (c) he need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; in other words, he is not liable for mere errors of judgment; (d) he is not bound to give continuous attention to the affairs of his company; his duties are of an intermittent nature to be performed at periodical Board meetings and at the meeting of any committee to which he is appointed and though not bound to attend all such meetings, he ought to attend them when reasonably able to do so; and (e) in respect of all duties which, having regard to the exigencies of business and the Articles of Association, may properly be left to some other official, he is, in the absence of ground for suspicion, justified in trusting that official to perform such duty honestly.”

The above propositions have been re-iterated in an Oudh case²⁸.

The directors cannot be held personally liable on the ground that they have trusted the regularly authorised officers of the company that they have failed to detect and been misled by misrepresentation or concealment by such officers where there was no reason for doubting their fidelity.²⁷ In the last mentioned English case, a bank had sustained heavy losses by the issue of fraudulent balance sheets and the improper advance of moneys to its customers, owing to the fraudulent acts of the manager and the chairman, it was held that a director who was innocent of any complicity was not liable to the company for negligence in not discovering the frauds aforesaid. Halsbury L.C. observed, during the course of his judgement in that case, as follows :—

“It is obvious that if there is such a duty (of detecting fraud) it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman and find out whether auditors, managing directors and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts and that he believed such assurance is involved in the admission that he was guilty of no moral fraud, so that it comes to this, that he ought to have discovered a net work of conspiracy and fraud by which he was surrounded.....I cannot think it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put in position of trust for the express purpose of attending to the details of management.”

26. *S. C. Mitra Liquidator Bank of Oudh v. Nawab Ali Khan* A. I. R. 1926 Oudh 153 (156).

27. *National Bank of Upper India, Lucknow v. Dina Nath*, A. I. R. 1926 Oudh 243 (246) following *Davey v. Cory* (1901) A.C. 477.

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27. *National Bank of Upper India, Lucknow v. Dina Nath*, A. I. R. 1926 Oudh 243 (246) following *Davey v. Cory* (1901) A.C. 477.

Lord Davey in the aforesaid case made the following pertinent observations at page 492 of the report :—

“ I think the respondent was bound to give his attention to and exercise his judgment as a man of business, on the matters which were brought before the board at the meetings which he attended and it was not proved that he did not do so. But I think he was entitled to rely upon the judgment, information and advice of the chairman and general manager as to whose integrity, skill and competence he had no reason for suspicion.”

Again, directors are not liable for declaring dividend unwisely. They are, however, liable, if they paid it out of capital. But the onus of proving that they have done so lies upon the person who alleges it. It is not for the directors to prove, especially after a lapse of a considerable time, that the dividends were in fact paid out of profits.²⁸

In another case²⁹ where it was alleged that the directors were liable on the ground *inter alia* that they had made an improvident loan to one of themselves, it was held they were not liable.

Lord Hatherley, L. C., during the course of his judgment in that case observed as under :—

“ They were entrusted with full power of lending the money and it was part of the business of the concern to trust people with money, and their trust to an undue extent was not a matter with which they could be fixed, unless there was something more alleged, as for instance, that it was done fraudulently and improperly and not merely by a default of judgment.”

The law as to the liability of directors for negligence has been aptly summed up by Lord Justice Cotton in³⁰ as follows :—

“ The directors are confidential agents with liabilities of trustees ; but they have a large discretion and if they act *bona fide* they are relieved, and are not liable for want of judgment or errors if they make a payment which is not in fact for the purposes of the company.”

A director would, however, be liable if he is guilty of gross negligence ;³¹ but the burden of proving that the non-performance of any particular acts amounts to such negligence rests on him who alleges it.³²

Negligence for non-attendance of Board meetings :—Neglect or omission to attend meetings is not the same thing as a neglect or omission of duty, which ought to be performed at those meetings. Accordingly, where a trustee of a savings bank did not attend its meeting for a long period, he was excused, there being 50 trustees³³.

In the case last mentioned a director who had not attended Board meetings for 4 years was held not to be personally liable for fraudulent reports and balance sheets issued and passed by his co-directors and for dividend paid by the latter. As observed by Jessel, M.R.

28. *City Equitable Fire Insurance Co.*, (1925) 1 Ch. 407.

29. *Turquand v. Marshall* (1869) L. R. 4 Ch. A. 376.

30. *Faure Electric Accumulator Co.*, (1888) 40 Ch. D. 141 (150).

31. *Govind v. Rang Nath* 52 R. L. R. 222.

32. *Liverpool Household Stores* (1890) 59 L. J. Ch. 616.

33. *Marquis of Bute's Case* (1892) 2 Ch. 100 see also *City Equitable Fire Insurance Co.* (1925) 1 Ch. 407 (429) and *Re Denham (Charles) & Co.*, (1883) 25 Ch. D. 752.

directors are bound, no doubt, to use all reasonable diligence, having regard to their position, though probably an ordinary director who only attends at the Board occasionally cannot be expected to devote much of his time and attention to the business as the sole managing partner of an ordinary partnership; but they are bound to use fair and reasonable diligence in the management of their company's affairs and to act honestly³⁴

(ii) **Liability for misfeasance and breach of trust** :—This has been dealt with in the II Volume 'Winding up & Other Miscellaneous Matters' as it relates to the proceedings in the course of winding up of a company.

Other statutory liabilities of directors :—The Act prescribes penalties for certain defaults by directors and other officers of the company for non-observance of the provisions as contained in various sections.

Unlimited liability of directors in winding up in certain cases .—Section 157 of the Act describes the liability of directors, whose liability is unlimited, in the winding up of a limited company. Such a director, whether past or present, is liable in winding up of the limited company, to contribute to the assets of the company, to an unlimited extent, in addition to his liability, if any, to contribute as an ordinary member, as if he were at the commencement of the winding up, a member of an unlimited company, subject, however, to the following rules :—

- (i) A past director shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before commencement of the winding up;
- (ii) A past director shall not be liable to make such further contributions in respect of any debt or liability of the company, contracted after he ceased to hold office;
- (iii) Subject to the articles, a director shall not be liable to make any such further contribution, unless the Court deems it necessary to require such contribution in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up.

Reference may in this connection be also made to Ss. 70 and 71 of the Act. S. 70 provides that in a limited company, the liability of directors or of any director may be made unlimited by a provision to that effect in the Memorandum of the company. In such limited company (in which the liability of any director is unlimited) the directors of the company, if any, and the member who proposes a person for election or appointment to the office of director shall add to that proposal a statement that the liability of the person holding that office will be unlimited and the promoters and the officers of the company, or one of them, before the person accepts the office or acts therein, must give him notice in writing that his liability will be unlimited. The express notice to every person proposed to the office of director that his liability will be unlimited, has been made compulsory with a view to protect unwary persons from being trapped into this position. The section aforesaid further provides that if any director or promoter makes default

34. *Forest of Dean Coal Mining Co.* (1878) 10 Ch. D. 450 (452).

in adding such a statement or if any promoter or officer of the company makes default in giving notice as aforesaid, he shall be liable to a fine not exceeding Rs. 1000 and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the said default.

A limited company may, if so authorised by its articles, by a special resolution alter its Memorandum so as to render unlimited the liability of its directors or of any director. Upon the passing of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the Memorandum (S. 71). Thus the liability of the directors in a limited company may be made unlimited if there is a provision in the articles to do so by altering its Memorandum by a special resolution.

CHAPTER XVI

DIRECTORS (Contd.)

STATUTORY AND OTHER GENERAL PROVISIONS REGARDING DIRECTORS.

Number of Directors:—The articles usually specify the maximum and minimum number of directors. Sometime they contain a provision that such number shall be determined by the subscribers of the Memorandum of Association or by a majority of them. It must, however, be noted that, in fixing the minimum number, the provisions of S. 83 A of the Act must be complied with. According to the last-mentioned section public companies and private companies which are subsidiary to the former must have at least three directors. There is, however, no such restriction for private companies. A private company may, therefore, have less than three directors. It is more than doubtful if a private company should have any director at all. But in view of the fact that the regulation 71 of Table A has been made compulsorily applicable to all companies (including private companies) by S. 17 (2) of the Act, the better view appears to be that a private company should have directors though not necessarily three, as the provisions of S. 83 A as to the minimum number do not apply to such a company.

Where the articles unequivocally provide for the maximum and minimum number, it is not open to shareholders in general meeting to vary that number, without altering the article in question by a special resolution as contemplated by S. 20 (1) of the Act. But if power is reserved in the article for the shareholders in general meeting to vary the number of directors, if they so choose, they may alter the number of such directors in general meeting (subject, however, to the minimum prescribed by S. 83A referred to above) without an alteration in the articles concerned. Accordingly, where one of the articles provided as follows:—"Until otherwise determined by general meeting, the number of directors shall not be less than five nor more than nine, it was held that on a right construction of the article in question it was open to the shareholders to vary the number of directors therein referred to without in any way necessitating an alteration in the article itself"²⁰

Niamatullah, J. who delivered the judgment in the last-mentioned case made the following observation in this connection:—

"The learned advocate for the appellants contended that, in so far as the increase in the number of directors involved an alteration of Art. 98 of the Articles of Association, it should have been sanctioned by a special resolution and that, in the absence of such a resolution, the number of directors could not be increased. Art. 98 is worded as follows:—'Until otherwise determined by a general meeting, the number of directors shall not be less than

26. *Gur Prasad v. Rameshwar Prasad* A. I.R. 1933 All. 244.(216) : 55 All. 390.

five, nor more than nine.' Having carefully considered the argument addressed to us on behalf of the appellants, I think that merely increasing the number of directors does not involve any alteration in Art. 98, which itself gives latitude to the shareholders in that respect. The words "until otherwise determined by a general meeting" clearly imply that it was open to the shareholders to alter the number of directors mentioned in Art. 98. If the shareholders do alter it, their action is in pursuance of Art. 98 and not otherwise. If the contention put forward on behalf of the appellants be accepted, the article will have to be read as if the aforesaid words were not part of it. No clear authority was quoted in support of the view urged on one side or the other. The cases that were referred to in the course of the argument are those in which the question did not directly arise and no opinion was definitely expressed. It is therefore, unnecessary to examine them in this connection. In my opinion the right construction of the article is, as already indicated, that it is open to the shareholders to vary the number of directors therein referred to without in any way necessitating an alteration in the article itself."

APPOINTMENT OF DIRECTORS

General Rule :—The directors of a company, other than a private company, must in default of and subject to the articles of the company, be appointed by the members in general meeting [S. 83 B (ii)]. The articles, however, generally provide for the appointment of new directors by the existing Board of Directors in certain specified cases, e.g., election of additional directors or filling in of casual vacancies in the Board of Directors caused by death, resignation or arising otherwise than by retirement in usual course. We shall discuss these cases hereafter in detail. It may, however, be noted at this stage that the election of person by directors as a director entitles him to hold office till the next general meeting of the shareholders, while if he is elected at the general meeting of the shareholders, he is entitled to hold office for three years.²⁶

Appointment of the first directors :—The directors of a company are usually mentioned in its articles, and where they are so named, there is not much difficulty, as they become the first directors of the company. Sometimes, the articles, instead of naming them, give power to the subscribers or majority of them to appoint directors. The regulation 68 of Table A is an instance of the last kind. It provides, *inter alia*, that the name of the first directors shall be determined in writing by a majority of the subscribers of the Memorandum of Association. In a case of this nature, a majority of subscribers must act in making the appointment of the first directors, through such appointment may be made by writing without a formal meeting of the subscribers. Until the subscribers have made the appointment as aforesaid, a general meeting of the company must not be held to do any acts.²⁷

In the absence of any provision in the articles of a public company regarding the names of the first directors or their appointment by the subscribers, the subscribers of the

26. See Footnote at p. 185

27. *Great Northern Salt Co. (1890) 44 Ch. D. 472.*

Memorandum shall be deemed to be the directors of the company until the appointment of the first directors. [S.83B(1) (i)]

Appointment of permanent directors:—It is not unusual, more particularly in the case of private companies, to appoint certain persons as permanent directors. Such directors are not liable to retire by rotation by a specific provision in the articles to that effect. In the case of private companies there is and can be no restriction on the number of such directors, but in the case of public companies, at least two-third of the Board of Directors must be persons who are liable to retire by rotation. [S. 83 B (2)] The last mentioned sub-section provides that notwithstanding anything contained in the articles of a public company not less than two-third of the whole number of directors must be persons whose period of office is liable to determination at any time by retirement of directors in rotation. The only exception to this rule is contained in the proviso to S. 83 B (2) of the Act, which provides that the last mentioned sub-section shall not apply to a company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, where by virtue of the articles of the company the number of directors whose period of office is liable to determination at any time by retirement of directors in rotation falls below the two-third mentioned in S. 83 B (2) above.

Thus S. 83B(2) in a way recognises that one-third of the whole number of directors in a public company can be such persons as are not liable to retirement by rotation. This sub-section however, appears to conflict with the regulation 78 of Table A, which is one of the compulsory articles for all public companies in view of S. 17 (a), requiring as it does all directors to retire at the first ordinary general meeting. (Vide regulation 78 of Table A). This is an apparent inconsistency.

The purpose of S. 83 B (2) referred to above appears to be that at least two-third of the total number of directors should be elected by the shareholders. But as pointed out by Messrs Sarkar and Sen in their famous commentary on the Indian Companies Act [Pp. 250-251, 1st Ed.] the object for which this sub section was introduced has failed, because of the absence of a further provision in the said sub-section or in fact any where in the Act that the persons to be appointed as directors in place of the retiring ones must be elected by the shareholders.

Filling up of a casual vacancy;—The articles usually provide for filling up of any casual vacancy in the Board of Directors caused by death, resignation or otherwise. Such vacancy is usually filled up by the remaining directors. In default of and subject to any regulations in the articles of a public company in this respect, however, any casual vacancy occurring among the directors may be filled up by the directors. But the persons so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed as a director. [S. 83 B (1) (iii)]. Thus a person appointed to fill up the said vacancy holds office for the unexpired term of the director in whose place he is appointed,

If there is an express power given by the articles to the directors to fill up casual vacancies, this will negative any implied power on the part of the company for

the same purpose, if the directors are willing to act in the matter.²⁸ Where, however, there are concurrent powers one in the directors and other in the company the exercise of the power by the directors after the exercise of the same by the company in this respect was held to be bad.²⁹ But where the casual vacancy occurred just before the ordinary general meeting and was not filled up, the meeting having only elected directors to the places of directors who had retired by rotation, it was held that the Board of Directors could fill it up subsequently, as the powers to fill up such vacancies continued in the Board of Directors in such a case.³⁰

Casual vacancy—Meaning of:—The term “casual vacancy” has been interpreted to mean any vacancy arising otherwise than by retirement in usual course and includes vacancy caused by death, resignation or bankruptcy.³¹ Thus “casual vacancies” are all such vacancies as occur by death, resignation, disqualification, the failure of the elected directors to accept office, or for any other reason than retirement by rotation. The Madras High Court, has, following the above English decision, held that a casual vacancy means in general, any vacancy occurring by death, resignation or bankruptcy and not by effluxion of time.³²

Additional directors :—A provision is usually made in the articles empowering the directors to appoint additional directors. Regulation 85 of Table A is an instance in point. It authorises directors, in their discretion, to appoint additional directors from time to time. The power to appoint additional directors can, however, be only exercised so long as the maximum number of directors as fixed by the articles is not exceeded.

A question arises as to whether a company is prevented from exercising its inherent power which it possesses of appointing additional directors, where the power to appoint additional directors has been delegated to directors by its articles. The question has been answered in the affirmative in *Blair Open Hearth Furnace Co., v. Rogart* [(1913) 108 L. T. 665] wherein it has been held that if the power to appoint additional directors has been delegated by the articles to directors exclusively, this will negative any implied power on the part of the company for the same purpose, and a general meeting will have no power to appoint additional directors. A contrary view seems, however, to have been taken in some other cases³³, wherein it has been held that the inherent power of the company to fill vacancies in the Board of Directors or to appoint additional directors continues unaffected, notwithstanding the delegation aforesaid.

No such question, however arises in cases where only limited power in this respect has been conferred on the directors or where the directors cannot agree or are unable to make appointment and the Board of Directors will not act either purposely or

28. *Blair Open Hearth Furnace V. Rogart* (1913) 108 L. T. 665.

29. *Isaacs N. Chapman* (1916) 32 T. L. R. 237 C. A.

30. *Munster v. Cammell Co.*, (1882) 21 Ch. D. 188.

31. *York Training Co., v. Village*, L. B. D. 635 (694).

32. *M. K. Srinivasan v. Waterp Subramani Ayyar* A.I.R. 1952 M. 100.

33. *Isle of Wight Railway Co., V. Tahourdin* (1883) 25 Ch. D. 890 (238 & 338) See also *Munster v. Cammell Co.*, (1882) 21 Ch. D. 188.

Because of disputes among the directors, as the company in such cases undoubtedly retains the power to appoint new directors.³⁴

Who may be appointed directors :—The articles usually provide as to the qualification of a person who may be appointed as a director. Such person may be a company, for there is nothing to prevent a limited company from being a director.³⁵ The number of shares which a person must hold so as to act is often fixed by the articles. As the Act is silent on the question as to whether the directors are to hold any shares at all, it is not obligatory for a company to have a provision in its articles in this respect. Where there is no such provision in the articles, even a person holding no share of the company may be appointed a director. The qualification shares, if any, must be acquired by the person acting as a director, within two months after his appointment or such shorter time as may be fixed by the articles. [S. 85 (1)]. Where, however, the articles specify that no person shall be eligible as a director unless he holds the prescribed qualification shares the holding of such qualification becomes a condition precedent, and the appointment of an unqualified person is void even if he subsequently acquires the necessary shares.³⁶ Such a provision does not, however, prevent unqualified person from being appointed by the articles, for this is not an election.³⁷

Third party cannot challenge appointment of directors :—A third party cannot challenge the appointment of a director. Where, therefore, a company is shown to have accepted a certain person for many years as its director and has never, on any occasion, repudiated his acts as such, it is not open to one who is not concerned with the company to challenge the appointment of such director or to contest his authority to act on behalf of the company.³⁸

Defect in appointment—Effect of :—S. 86 of the Act provides that the acts of a director shall be valid notwithstanding any defect that may be discovered in his appointment or qualification, provided nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid. The object of the aforesaid section is to make the honest act of *de facto* director as good as the honest acts of the *de jure* director.³⁹ The section would, however, only protect the *bona fide* acts of such a director prior to the invalidity of his appointment or qualifications being known but not after the invalidity becomes known.⁴⁰ The aforesaid

34. *Barron v. Potter* (1914) 1 Ch. 895; *Isle of Wight Railway Co., v. Tahourdin* (1883) 12 Ch. D. 320 & *Wrocester Corsetry Ltd. v. Witting* (1936) Ch. 640.

35. *Bulawayo Market Co.*, (1907) 2 Ch. 458.

36. *Barber's case* (1877) 5 Ch. D. 963; *Jenner's case* (1878) 7 Ch. D. 132.

37. *Stock's case* (1865) 4 De G. & J. & S. 426.

38. *Imperial Oil Supply & General Mills Co., v. Wazir Singh*, 31 I. C. 595 : A.I.R. 1915 Lah. 478.

39. *British Asbestos Co., v. Boyd* (1908) 2 Ch. 439 (445).

40. *Hallows v. Fernie* L. R. 3 Ch. A. 467 (478) ; *Tyre Mutual Steam seip Insurance Association v. Peter Brown*, 4 L. T. 285.

provision may validate such acts not only between the company and outsiders, but also as between the company and the members or between the members *inter se*.⁴¹

Again S. 86 operates to protect a person whose appointment as a director was invalid notwithstanding the fact that he was put on enquiry as to the validity of his appointment if the circumstances were such that, had he made all the enquiries he should have made, he would not have ascertained the true position. The section aforesaid further protects him and validates his acts, notwithstanding the fact that his co-directors were aware of the defect in their own and his title to act as director. The real criterion is whether such person has been acting as a director in good faith. If so, he is entitled to rely on the section. If, however, there is a lack of good faith, then he cannot be allowed to take the benefit of the section. A shareholder is bound to recognise the validity of acts done by *de facto* directors where such directors have been acting in good faith. Accordingly, where such *de facto* directors have allotted shares, a member of the company, who has suffered loss by reason of such allotment, is not entitled to recover damages on the ground of breach of contract as contained in the articles of the company that the business of the company should be managed by a *de jure* board of directors.⁴²

Restrictions on the appointment of directors:—No person is capable of being appointed a director of a company by the articles nor can he be named as a director in a prospectus issued by or on behalf of the company or as a proposed director in any prospectus issued in relation to an intended company, or in a statement in lieu of prospectus as a director, unless, before the registration of articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has, by himself or by his authorised agent, signed and filed with the registrar a consent in writing to act as such director, and either (i) signed the memorandum for a number of shares not less than his qualification (if any), or (ii) taken from the company and paid or agreed to pay his qualification shares (if any), or (iii) signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any), or (iv) made and filed with the registrar an affidavit to the effect that a number of shares, not less than his qualification (if any) is registered in his name. The conditions laid down in (i) and (iv) above do not, however, apply to a company not having a share capital [S. 84 (1)]. A person applying for the registration of the memorandum and articles of a company is required to file with the registrar a list of persons who have consented to be directors of the company and if this list contains the names of any persons who have not so consented, the applicant is liable to a fine not exceeding Rs. 500. [S. 84 (2)]. None of the above provisions, however, applies to (1) a private company or (2) a company which was a private company before becoming a public company or (3) a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business; [S. 84 (3)].

The object of the aforesaid provision is really to ensure that the persons acting as directors acquire the necessary qualification shares and pay or agree to pay for the same and that no person is appointed as director against his consent. Where, however, in

41. *Dawson v. African Consolidated Co.* (1898) 1 Ch. 6; *British Asbestos Co. v. Boyd* (1903) 2 Ch. 489.

42. *Kanssen v. Bialto (West-End) Ltd.* (1944) 14 Com. Cas. 151.

order to give certain person qualification shares, transfers of shares were passed before their election as directors at the Board's meeting but the transfers were not registered till after their election, it was held that though before their appointment as directors, the transferees had acquired an absolute right to registration, they were not qualified persons before actual registration and their appointment as directors was consequently void.⁴³

ROTATION OF DIRECTORS

Compulsory provisions as to rotation :—The provisions as to rotation of directors are contained in Regulations 78 to 82 of Table A annexed to the Act, which are compulsory in view of S. 17 (2). Every company must adopt these regulations in its articles, provided however the regulations 78 to 82 shall not be deemed to be included in the Articles of Association of a private company except a private company which is the subsidiary company of a public company. [S. 17(2) proviso (1)].

The regulations aforesaid provide as follows :—

1. At the first ordinary meeting of the company, the whole of the directors shall retire from office, while at the ordinary meeting in every subsequent year one-third of the directors for the time-being or the number nearest to one-third (if their number is not three or a multiple of three) must retire from office. [Reg. 78]. As pointed out under "Appointment of Directors" above, this provision seems to conflict with S 83B(2) of the Act, inasmuch as the whole of the directors must, according to this provision, retire from office at the first ordinary meeting of the company and one-third of them for the time being at the ordinary meetings in the subsequent years, and there is thus no distinction recognised between permanent directors and directors liable to retirement by rotation; while S. 83 B(2) in a way recognises the distinction last mentioned by implying that one-third of the whole number of directors can be such persons as are not liable to retirement by rotation. This appears to be an apparent inconsistency in the Act.

The object of a clause of this nature is to enable the shareholders to get rid of the first directors usually appointed by the subscribers to the memorandum and to elect their own directors in their place if they so choose. Temporary or additional directors, who must retire at the next ordinary general meeting should not, however, be counted while calculating the one-third number liable to retirement by rotation.⁴⁴

2. The directors who have been longest in the office since their last election must retire first, but as between persons who became directors on the same day, it must be determined by lot as to who should retire first, unless they otherwise agree among themselves. [Reg. 79].

3. A retiring director is eligible for re-election [Reg. 80].

4. The company may fill up the vacated office by electing a person thereto at the very general meeting at which a director retires by rotation, [Reg. 81].

5. If at any meeting at which an election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till

43. *Spencer V. Kennedy* (1926) Ch. 125.

44. *Eyre V. Milton Proprietary Ltd.*, (1936) 1 Ch. 244 (C. A.)

the same day in the next week at the same time and place. and if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of them as had not their places filled up shall be deemed to have been re-elected at the adjourned meeting, [Reg. 82].

Compulsory provisions not applicable to private companies :—As stated above Art. 78 to 82 need not be adopted by a private company except the private company which is the subsidiary of a public company,

REGISTER OF DIRECTORS

Contents of such register :—Every company is required to keep at its registered office, a register of its directors, managers and managing agents, containing with respect to each of them the following particulars :—

(a) In the case of an individual, his personal name in full, any former name or surname in full, his usual residential address, his nationality, and if that nationality is not the nationality of origin, his nationality of origin and his business occupation, if any, and if he holds any other directorship or directorships, the particulars of such directorship or directorships ;

(b) in case of a corporation, its corporate name and registered or principal office and the full name, address and nationality of each of its directors ; and

(c) in the case of a firm, the full name, address and nationality of each partner and the date on which each became partner.

Return as to change :—The company must, within 14 days from the appointment of directors, and within 14 days of a change among its directors, or in any of the particulars contained in the register, send to the Registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managers or managing agents or in any of the particulars contained in the register.

Inspection of Register :—The said register should be kept open to the inspection of any member without charge and of any other person on payment of a fee not exceeding Re 1, as the company may impose, during the business hours subject to such reasonable restriction as the company may, by its articles or in general meeting, impose so that at least 2 hours in a day are allowed for inspection. Default in complying with the provisions above mentioned, makes the company and every officer of the company knowingly and wilfully a party to such default, liable to a fine of Rs. 50 and in case of refusal of inspection the Court may, on the application of the person aggrieved, and upon notice to the company, direct an immediate inspection of the register, (Section 87). Thus under S. 87, a company is bound to keep a register containing correct particulars in regard to its directors, and when there is any change in regard to the directorate, the company is bound to register such change. It is not open to the company to say that it was unaware of any change, but it must make arrangements to be informed of any changes as and when they take place.⁴⁴

QUALIFICATIONS OF DIRECTORS

A director must hold the qualification shares which he may be required to hold by the articles and must obtain, if not already qualified, his qualification within 2 months after his appointment or such shorter time as may be fixed by the articles or else he shall be liable to a fine not exceeding Rs 50 for every day beyond the period above mentioned on which it is proved that he acted as a director, (S. 85). There is nothing in the Act which makes it obligatory on a director to hold shares. They may also be added or amended in accordance with the procedure laid down therefor, so as to make provision for non-shareholders' to hold the office of director. (a)

According to Section 103 (1)(b) a company cannot commence its business until the directors have paid for their qualification shares in cash in the same proportion as payable on application and allotment of the shares by other members of the public. The provision as to the holding of qualification shares shall, however, be satisfied if the director in question be a joint holder of the requisite number of shares, (b) or even if he holds them as trustee unless the articles provide to the contrary. (c).

Again the provision aforesaid is sufficiently complied with if he obtains the shares from the market or by transfer from any other shareholder as it is not necessary that they should acquire them from the company. (d). Where, however, the articles provide that no person shall be eligible as a director unless he holds a specified number of shares the possession of the qualification shares is a condition precedent to his election as a director and if he, at the date of his appointment as director, is not the holder of the requisite number of shares, he is not competent to act and his election and appointment are void, (e) for he is not a qualified person unless he is the registered holder of the requisite number of shares. (f) A director who does not obtain his qualification shares within 2 months of his appointment, is disqualified from acting as a director but the mere acting as such does not import an agreement to take the shares from the company though he may be estopped by his conduct to repudiate the shares, if he is put on the register after the period of 2 months. (g). Where, however, the articles provide that if a director does not qualify within a certain time he would be deemed to have agreed to take up shares from the company and after the expiration of the said time he remains in office, the company or its liquidator may place his name on the register for the requisite number of qualification shares. (h) If, however, he resigns before the expiration of the aforesaid time, he escapes from liability thereby. (i).

(a) *Peoples Bank of Northern India*, in re, A. I. R. 1933 Lah. 5.

(b) *Glory Paper Mills Co.*, (1894) 3 Ch. 473 & *Grundy v Bridge* (1910) 1 Ch. 444.

(c) *Bainbridge v Smith*, 41 Ch.D. 462 and *Sutton v English & Colonial Produce Co.*, 1902 Ch. 502.

(d) *Hamley's case*, 5 Ch. D. 705 & *Brett's case*, 24 Ch. D. 283.

(e) *Jenner's Case*, 7 Ch. D. 132.

(f) *Spencer v Kennedy* (1926) Ch. 125.

(g) *Brown's case* 9 Ch. A 102.

(h) *Isaac's case* (1892) 2 Ch. 158.

(i) *Salisbury Jones case* (1894) 3 Ch. 356.

A person who acquires qualification shares by accepting them as a gift from the promoters or vendors, is guilty of gross breach of trust and is liable to account to the company for any damages sustained by such breach of trust; (j); but he would none the less be a duly qualified person to act as a director (k). The company can only compel him to give up the shares and to account for their value in such a case (l).

VALIDITY OF ACTS OF DIRECTORS NOTWITHSTANDING DEFECT IN APPOINTMENT OR QUALIFICATION.

(See also Defect in appointment—effect of, *Supra*)

S. 86 makes the honest acts of *de facto* directors as valid as that of the *de jure* directors. Accordingly, where a director, whose period of office had expired, entered into an agreement with a third party, on behalf of the company and the other shareholders agreed to ratify and also carry out the terms of the agreement, it was held that the irregularity, if any, was cured and the company was estopped from challenging the validity of the agreement on the ground that the director was not duly appointed.¹ But a Company may bring an action to restrain a *de facto* director from acting as such.² Similarly where a person acting as a director *bona fide* signed a plaint on behalf of the company though he was not validly appointed, it was held that he was a *de facto* director and his act in signing the plaint was validated under S. 86.³ Similarly where directors were appointed at a meeting of which less than 13 days notice was given and the defect remained un-noticed until some call was made by them, it was held that the defect was cured under the provision aforesaid.⁴ Likewise it has been held that a call, made by directors who had not been duly appointed or were disqualified, was valid.⁵ On the same principle it has been held that a director taking part in irregular proceedings, may be estopped from setting up the irregularity.⁶

The above provision will not, however, protect a person who knows of the invalidity of the appointment;⁷ but the mere fact that a person claiming the benefit of this provision had notice of the existence of the fact which led to the disability, is not sufficient to dis-entitle him to rely upon it, if he could honestly say that he was not aware of the defect and the consequent disqualification.⁸ If the circumstances, however, are such that the person claiming the benefit was put on enquiry or had constructive notice as to the invalidity of appointment or qualification, he would not be protected.⁹

(j) *Hay's case* 10 Ch. A. 593, *Carling's case* 1 Ch. D. 115.

(k) *In re Innes & Co.* (1903) 2 Ch. 254.

(l) *Weston's case* (1879) 10 Ch. D. 579.

1. *Joseph V. Kyanktaja Grand Co., A.I.R.* 1935 Rang. 76 following *Mahony P. O. v. East Holyford Mining Co. Ltd.* (1876) 33 L.T. 383 and *Aron Solomon v. A. Solomon & Co.* (1897) A.C. 22.

2. *Foss v. Harbottle* (1843) 2 He. Re. 461.

3. *Ram Raghubir v. United Refineries Ltd.*, 9 Rang. 56.

4. *Britain Medical, General and Life Association v. Jones* (1889) 61 L. T. 384.

5. *Dawson v. African Consolidated Co.*, (1896) 1 Ch. 6.

6. *Faure Electric Accumulator Co. v. Thillipart* (1898) 58 L. T. 525 (527).

7. *Stafford Shire Gas Co.* 65 L. T. 413 and *Tyre Mutual Steamship Insurance Association v. Peter Brown*, (1846) 74 L. T. 47;

8. *Channel Coalieries Trust v. Dawer etc., Light Railway Co.* (1914) 2 Ch. 512.

9. *B. Ligget Ltd. v. Bartley Bank Ltd.* (1928) 1 K. B. 48.

VACATION OF OFFICE

Office of director—when vacated :—The office of a director shall be vacated (a) if he fails to obtain his qualification shares, if any, within 2 months after his appointment or such shorter time as may be fixed by the articles, or if he, at any time thereafter ceases to hold the share qualification, if any, necessary for his appointment; or (b) he is found to be of unsound mind by a court of competent jurisdiction; or (c) he is adjudged an insolvent; or (d) he fails to pay calls made on him in respect of shares held by him within 6 months from the date of such calls being made; or (e) he or any firm of which he is partner or any private company of which he is a director, without the sanction of the company in general meeting, accepts or holds any office of profit under the company, other than that of a managing director, or manager, or legal or technical adviser or a banker; or (f) he absents himself from 3 consecutive meetings of the directors or from all meetings of the directors for a continuous period of 3 months, whichever is longer, without leave of absence from the Board of Directors; or (g) he or any firm of which he is a partner or any private company of which he is a director, accepts a loan or guarantee from the company in contravention of S. 86 D; or (h) he or the firm of which he is a partner or any partner of such firm or the private company of which he is a member or director, enters into any contract for sale, purchase or supply of goods and material with the company, except with the consent of the directors, in contravention of S. 86 F.

In addition to the contingencies above mentioned, the company may provide by its articles that the office of a director shall be vacated on grounds other than those specified above, (S 861).

Automatic vacation of office :—On the happening of any of the events mentioned above, the director vacates his office automatically for there is no *locus penitentia* for him, nor is there any means by which the director of the company can condone the offence or the act or waive the event which causes the vacation¹⁰; but if the qualification is subsequently raised, say from 50 to 250, he does not thereby cease to hold office.¹¹

Absence—meaning and period of :—Again absence from meetings as aforesaid means voluntary absence and does not include absence through sickness¹²; but may include such absence if ill-health obliges him to go abroad.¹³ The period of absence does not, however run until there is a meeting which it is his duty to attend and it runs only from the date of the last mentioned meeting.¹⁴

Insolvency—when a ground for vacation of office :—It may, however, be noted that under the Indian Companies Act, as at present, it is only when a person is adjudged an insolvent by a competent Court, either under the provisions of the Pro-

10. *Bodega Co. Ltd.*, (1904) 1 Ch. 276.

11. *Molineaux v. London Birmingham and Manchester Insurance Co.*, (1902) 2 K. B. 589.

12. *McConnel's Claim London and Northern Bank, in re.*, (1900) W. N. 114.

13. *McConnel's Claim London and Northern Bank in re.* (1901) 1 Ch. 728.

14. *McConnel's Claim, etc.* 1 Ch. 728 (731).

vincial Insolvency Act, or under the provisions of the Presidency Towns Insolvency Act, that a person vacates his office on the ground of insolvency. The English decisions ¹⁵, taking a different view are no longer applicable in India.

DISABILITIES OF DIRECTORS—General

The disabilities of directors are laid down in Section 86 A to 86F, 86 H and 91 A to 91 D of the Indian Companies Act and may be stated as follows :—

1. **Ineligibility of bankrupt to act as a director :—**A person who is an undischarged insolvent, should not act as a director or managing agent or manager of any company, whether incorporated in British India or incorporated outside British India, having established place of business within British India ; and, if he so acts, he is liable to imprisonment not exceeding 2 years or to a fine not exceeding Rs. 1000 or to both (Section 86 A.)

2. **Assignment of office of directors :—**A director or manager of a company cannot assign his office to another person even when there is provision in the articles of the company or even where there is an express provision in an agreement between him and the company to that effect, unless and until such appointment is approved, by a special resolution of the company ; provided, however, that the exercise by a director of a power to appoint an alternate or substitute director to act for him during an absence of not less than 3 months from the district in which meetings of the directors are ordinarily held, if done with the approval of the Board of Directors, shall not be deemed to be an assignment of office. Any such alternate or substitute director shall, however, *ipso facto*, vacate office, if and when the appointer returns to the district in which meetings of the directors are ordinarily held. The provisions as to alternate or substitute directors are usually inserted in the articles with a view to provide for temporary vacancies authorising directors during their temporary absence to appoint alternate or substitute directors in their place and thus avoid casual vacancies to be created and filled up. (Section 86B).

3. **Non-exemption from liability arising from any neglect, default, breach of duty or breach of trust :—**Before the passing of the Indian Companies (Amendment) Act, 1936, it has been the practice of companies to provide an indemnity clause in their articles with a view to give protection to the directors and auditors except in case of wilful default or neglect. S. 86C of the Indian Companies Act, however, provides that notwithstanding any provision in the articles of the company or any contract with a company or otherwise, any provision for exempting any director, manager or officer of the company or any other person employed by the company as auditor, from any liability or for indemnifying him against any liability in respect of any negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the company, shall be void. Consequently directors or other officers of the company shall not be protected in spite of an indemnity clause to that effect, if there is negligence or breach of duty or trust. ¹⁶ It has been held that the directors

15 *Harrold Sasson & Co. v. Sasson* (1910) S. T. 802 and *James v. Rockwood Colliery Co.* (1912) W. N. 263.

16 *in re. Cordiff Savings Bank* (1892) 2 Ch. 100 & *Brazilian Rubber Plantations and Estates, in re.* (1911) 1 Ch. 425 and *Smith v. Duke of Manchester* 24 Ch. D. 611.

as agents are entitled to indemnity in respect of liabilities properly incurred by them in the management of the business of the company.¹⁷ They have, for instance, been held entitled to be indemnified against costs incurred by them in defending an action of libel in connection with a report made by them for the company.¹⁸ These decisions must, however, have now to be read subject to S. 86 C and in the light of the proviso thereto.

Exception to the above rule :—Proviso (c) to section 86 C provides that a company notwithstanding anything in section 86 C, may in pursuance of an indemnity provision, in its articles, indemnify any director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgement is given in his favour or in which he is acquitted; or in connection with any application under Section 281 of the Indian Companies Act, in which relief is granted to him by the Court.

4. Prohibition against loans to directors:—Except a private company (not being a subsidiary company of a public company) or banking company, no company shall make any loan or guarantee any loan made to a director of the company or a firm of which such director is a partner or to a private company of which such director is a director. The contravention of the above provision makes the director concerned punishable with a fine which may extend to Rs. 500 and in case of default in repayment of the loan or in discharging the guarantee, he is liable jointly and severally for the amount unpaid, (Section 86 D).

Where, therefore, loan is sanctioned to a director of a company (not of a private company or banking company) there is undoubtedly a contravention of the provision of Sec. 86 D aforesaid. The director whose attention was subsequently drawn to this fact should at once take steps to terminate the illegal loan. In such a case it is also the duty of the Registrar of the Joint Stock Companies to take action in the matter when the matter is brought to his notice and at least to warn the directors that they should see that such illegality was not committed again and that they should take steps to end it.¹⁹

Exclusion of banking companies :—The exclusion of banking companies under clause (3) of the section aforesaid from the operation of S. 86 D (1) makes it clear that the loans to a director of a bank are contemplated as a part of its business. In the absence of authority, therefore, in the Articles of Association of a banking company to the effect that a director defaulting in repayment of loan taken by him would cease to be a director, he cannot be said to have vacated his office if he had defaulted in the repayment of the loan taken by him some years previously, despite the fact that the directors had passed a rule that any director defaulting in repayment of a loan taken by him would cease to be a director. The removal of a director of a bank on the ground aforesaid by a resolution of directors under the rule above mentioned is *ultra vires* entitling such a director to damages.²⁰

17. *German Mining Co., in re.* 4 De, G.M& G. 19.

18. *Famatina Development Corporation* (1914) 2 Ch. 271.

19. *Subbier v. Lakshmanan Ayer* (1942) 12 Com. Cas. 136; A.I.R. 1942 Madras 452.

20. *Albuquerque v. Catholic Bank* 12 Com. Cas. 213; A.I.R. 1942 Madras 737.

5. Director not to hold office of profit:—Except with the consent of the company in general meeting, no director or a firm of which such director is a partner or a private company of which such director is a director, shall hold any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or banker. The office of managing agent shall not, however, be deemed to be an office of profit under the company, (Sec. 86 E).

The above provision is intended to prevent the directors from doing anything inconsistent with their position as such and to accept or hold an additional office or place of profit under the company. The words "office or place of profit" are far reaching and have been held to include a trusteeship of debenture holder's deed.²¹ Where, however, the secretary was appointed as a director and after such appointment continued to perform the duties of secretary without salary, it was held that there was no disqualification.²²

6. Director not to vote when personally interested:—A director of a public company shall not as such vote on any contract or arrangement in which he is either directly or indirectly concerned or interested, nor shall his presence count for the purpose of forming a quorum at the time of any such vote, and, if he does so vote, his vote shall not be counted, (vide S. 91B). Accordingly where a director, who was also a creditor of the company, was held not entitled to vote for a resolution authorising that the money due to him would be set off against future calls, the resolution would be invalid, when necessary quorum was lacking without such director's vote, and he would, on liquidation, be placed in the list of contributors in respect of the unpaid share money.²³ The restriction above mentioned does not apply to the directors while voting on a contract of indemnity, and accordingly, any one of them may vote on any contract of indemnity against loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the Company. Nor does the restriction aforesaid apply to a private company, unless the latter is a subsidiary company of a public Company. In the last mentioned event, the said restriction shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding Company.

DISABILITIES IN RELATION TO CONTRACTS WITH COMPANY.

(a) Restriction to contract with company in certain cases:—A director stands in a fiduciary relation with a company and cannot, therefore, in the absence of any such provision to that effect in the articles, contract with the company.²⁴ The articles usually authorise directors to make contract with the company. But even where such power exists, sanction of the co-directors for a director entering into any contract with the company for the sale, purchase or supply of goods and materials is necessary. The above principle has received a statutory recognition by the Companies (Amendment) Act, 1936, and S. 86 F has accordingly been inserted in the Act. The last mentioned section provides that a director of the company or the firm of

21. *Astley v. New Tivoli Ltd.* (1899) 1 Ch. 151.

22. *Iron Shipping Coating Co. v. Blunt* (1868) L.R. 3 C.P. 494.

23. *Pandalai Assurance Company Limited*. I.L.R. (1942) Mad. 230 A.I.R. 1942 Mad. 95.

24. *Albion Steel etc. Co. v. Martin* 1 Ch. D. 580.

which he is partner or any partner of such firm or the private company of which he is a member or director, shall not, except with the consent of the directors, enter into any contract for the sale, purchase or supply of goods and material with the company. Any contract or agreement for sale, purchase or supply of goods which was entered into before the commencement of the Indian Companies Act, 1936, would, however, remain unaffected by the aforesaid provision (Sec. 86 F).

(b) *Disclosure of interest by directors in contracts with a company*:—Again, even where a director has the right to contract with the company, it is his duty to disclose his interest to the Board of Directors in order to enable the other directors to scrutinize the terms of the contract carefully.²⁵ Section 91 A gives a statutory recognition to the principle laid down above and enacts that every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company, must disclose the nature of his interest at the meeting of the directors at which such contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after acquisition of his interest or the making of the contract or the arrangement. The reason of the rule as pointed out by Lord Carnis in²⁶ is that no man acting as an agent can be allowed to put himself in a position in which his interest and duty will be in conflict. The company is entitled to the collective wisdom of its directors and if any of such directors is interested in a contract the company loses the benefit of the director's unbiassed judgment. The duty to disclose is based more or less on the principle that where there is a conflict between duty and interest, an agent must disclose any understanding likely to result in any gain to him, arrived at between the servant or agent and a third person who enters into a contract with the master or principal; otherwise such a secret bargain being a fraud on the master or principal will entitle him to rescind the contract with such third person.²⁷—Followed with approval in²⁸. Thus a director is precluded from dealing on behalf of the company with himself and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound by fiduciary duty to protect.²⁹ The principle is observed so strictly that no question is even allowed to be raised as to the fairness or unfairness of a contract in question.³⁰

Nature of interest to be disclosed:—The interest which a director of a company who stands in a fiduciary relation to the company, is bound to disclose is any

25. *Imperial Mercantile Credit Association v. Coleman* L. R. 6 II, L. 189, and *Costa Rica Rail Co. v. Forwood* (1900) 1 Ch. 756.

26. *Parker v. Mackenna* 10 Ch. A. 96.

27. *Transvaal Lands Co. v. New Belgium (Transvaal) Land & Development Co.* (1914) 2 Ch. 498; *Panama & South Pacific Telegraph Co v. India Rubber etc. Co.* (1875) 10 Ch. 555; *Shipway Broadwood*, (1899) 12-B 369 and *Hukman v. Kent etc.* (1915 12B. D. 881.

28. *Boulton Bros. v. New Victoria Mills*, A. I. R. 1929 All. 87 (94).

29. *North West Transportation Co. v. Beatty*, (1887) 12 A. C. 589.

30. *Bray v. Ford* (1896) A. C. 44.

interest which conflicts with his duty.³¹ Whether the interest is of such a nature or not must be a question of fact in each case and decided on reference to the wording of each statute. Generally speaking the principle is this: That, where the interest is such that it is likely to influence the directors against the company's interest, or likely to produce a conflict between his duty to the company and his duty to or interest in the other party to the contract, he is bound to disclose it.³² The interest of the director in the transaction must, however, be personal and either pecuniary or material; it may be direct or indirect, but it must be adverse to the company of which he is the director. Per Wadiah J, in *T. R. Fratt (Bcmly) Ltd. v. E. L. Sassoon & Co.* A. I. R. (1936) Bombay 62 (85).

When disclosure may be unnecessary:—Where the real nature of the interest is known to all the directors, it is not necessary to make a formal disclosure.³³ Again general notice that a director is a director or a member of any specified company or is a member of any specified firm and is to be regarded as interested in any subsequent transaction with such firm or company, shall, as regards any such transaction, be a sufficient disclosure and after such general notice it is not necessary to give any special notice relating to any particular transaction with such firm or company; (Proviso to Section 91A).

Effect of non-disclosure:—Sub section (2) of Section 91A makes every director contravening the provision of Section 91A (1) relating to the disclosure of interest by the directors, liable to a fine not exceeding Rs. 1,000, while sub-section (1) of Section 91B disqualifies an interested director to vote on the transaction in which he is interested, directly or indirectly, providing further that his presence shall not be counted for the purposes of forming a quorum at the time of voting over such contract and that, if he does so vote, his vote shall not be counted. So where the directors of a company personally guaranteed an overdraft granted to the company by a Bank, and subsequently passed a resolution that, subject to the approval of the Bank, debentures be issued to the Bank as security for the overdraft, and the debentures were issued accordingly, it was held that as all the directors were interested in the arrangement come to with the Bank with regard to the issue of the debentures the resolution providing for the issue was a nullity.³⁴ In another case a company owed a considerable sum of money to its managing agent, who had in turn received a substantial part thereof from his brother, another director of the company, as a loan in accordance with one of the Articles of Association which stated that the directors might, if they thought fit, receive from a member all or any part of the capital due upon shares held by him beyond the sum actually called for and agree to pay interest on any sum so received, a resolution was passed at a meeting of the directors enabling the managing agent to set off a part out of the

31. *Costa Rica Railway Co. Ltd. v. Forwood* (1901) 1 Ch. 746.

32. *Pydh Venkatachalaputty v. Gunttoor Cotton etc. Mills* A.I.R. (1929) Madras 353 (358).

33. *Imperial Mercantile Credit Association, v. Coleman* L. R. 6 Ch. A. 558 (568). *P. Venkatachalaputty v. Gunttoor Cotton Mills* A. I. R. (1929) Madras 353, affirmed in A. I. R. 1929 P. C. 244.

34. *Victor v. Lingard* (1927) 1 Ch. 323.

amount due to the latter from the company against what he owed in respect of the shares. Under the articles the quorum for directors' meeting was three and at the meeting which passed the resolution only three directors including the managing agent and his brother attended. Held, that as under S 91B of the Indian Companies Act the two brothers were not competent to vote because of their personal interest in the matter, there was no quorum for the meeting and the resolution passed thereat was invalid.—³⁵ A director may, however, vote on any contract of indemnity against any loss which he may suffer by becoming or being a surety for the company. The prohibition of voting by the interested director does not, however, apply to a private company unless the latter is a subsidiary company of a public company. In the last mentioned case the provisions aforesaid shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding company. (Section 91B).

Non-disclosure of such interest will not, however, *per se* render the contract void or voidable at the option of the company. Similarly voting by an interested director will not *per se* render the contract either void or voidable. But the non-disclosure or voting where, but for the vote, the contract would not have been sanctioned, will in all cases render the interested director liable to account for secret profits. ³⁶

The following extracts from the judgment of Wallace, J., in the last mentioned case are worthy of note:—

"Does this imposition of a penalty for non-disclosure or for voting carry with it, in law, the consequences, firstly, as regards the company, that the contract entered into with such a breach of obligation is void *ab initio* or voidable and secondly, as regards the offending director, is he liable for damages to the company if there is any loss to it on the contract, or is he liable to account for any secret profits made by him?" As regards the matter of non-disclosure, with which S 91(A) deals, the above consideration of S. 91(B) indicates that the mere fact that the Section imposes a penalty is no ground for inferring that the Section prohibits the contract or makes it illegal. It is significant that though S. 91(D) (3) in terms distinctly says that the breach thereof renders the contract void at the option of the company, *i.e.*, voidable, Ss. 91(A), 91(B) and 91(C) do not say so. Further S. 91(A) contemplates that the interest may be acquired after the contract has been passed by the company. In such a case it seems absurd to contend that an *ex post facto* omission to disclose an interest acquired subsequent to the contract will have the legal effect of rendering the contract void *ab initio* or voidable. This seems to me to indicate that, whatever the law may be in England, in India the law is that a breach of S. 91(A), (B) or (C) does not *ipso facto* render a contract void or voidable."

As observed by Lord Blansburgh in *Bell v. Lever Bros. Ltd.*, (1943) A.C. 161 (194):—

"The liability of a director, in respect of profits made by him from a contract in which his company is also concerned is one thing: his liability, if any there be, in respect of his profits from a contract in which the company

35. *K. C. Pandalai, v. South Indian General Association Co. Ltd.* (1941) Com. Cas. 327.

36. *Pydh Venkatachallaputty v. Guntoor Cotton Mills*, A. I. R. (1929) Mad. 353 (357).

has no interest at all is quite another. In the first case, unless by the company's regulations the director is permitted, subject to or without conditions, to retain his profit, he must account for it to the company. In the second case the company has no concern in his profit and cannot make him accountable for it unless it appears—this is the essential qualification—that in earning that profit he has made use either of the property of the company or of some confidential information which has come to him as a director of the company."

Where all the directors of a public company are interested personally in a certain resolution, the resolution so passed will be a nullity. Accordingly, where the directors of a company personally guaranteed an overdraft granted to the company by a Bank, and subsequently passed a resolution that, subject to the approval of the Bank, debentures be issued to the Bank for the overdraft and the same were issued accordingly it was held that as the directors were "interested" in the arrangement come to with the Bank in regard to the issue of the debentures, the resolution providing for the issue thereof was a nullity.³⁷

REMOVAL OF DIRECTORS

The company may, by an extraordinary resolution, remove any director, whose period of office is liable to determination at any time by retirement of directors in rotation, before the expiration of his period of office and may by ordinary resolution appoint another in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a director on the date on which the director in whose place he is appointed was last elected director. A director so removed shall not be reappointed a director by the Board of Directors. (Section 86G).

Thus under the provisions above mentioned the members of a company have been empowered to remove, by an extraordinary resolution, any director whose period of office is liable to determination at any time by retirement before the expiration of the period of his office; while power is also given to the members to appoint, by an ordinary resolution, another person in his stead. The term of office of the person so appointed shall, however, be equivalent to the unexpired term of the person in whose place he is appointed. Sec. 86 G does not, however, apply to the case of directors who are not liable to removal by rotation, nor does it apply to directors elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936.

RESIGNATION OF DIRECTORS

A director can, subject to the Articles of Association, at any time resign his office by a notice in writing, but he cannot withdraw his resignation without the company's consent.³⁸ Thus a resignation once made is irrevocable.³⁹

37. *Vistors Ltd v. Lingard* (1927) 1 Ch. 323.

38. *Towers v. African Tug Co.* (1904) 1 Ch. 358.

39. *Reg. v. Mayor etc.* 14 Q.B.D. 908 and *Glossop v. Glossop* (1907) 2 Ch. 370.

Acceptance of an oral resignation of a director by the company is effective and constitutes a binding contract even though the articles of the company require such resignation to be in writing.⁴⁰ If a director who is both a permanent and ordinary director resigns, the resignation applies to both the offices.⁴¹

NON-EXERCISE OF CERTAIN POWERS BY DIRECTORS

The directors of a public company or of a subsidiary company of a public company, shall not, except with the consent of the company in general meeting, sell or dispose of the undertaking of the company or remit any debt due to it by a director. (Sec. 86H). Accordingly the matters relating to the sale and disposal of the undertaking of the company and the remission of any debt due by a director are required to be done by the company itself in general meeting. In this connection it may be noted that a company cannot sell its undertaking unless there is a power reserved in the Memorandum of the company.⁴²

REMUNERATION OF DIRECTORS

General rule:—*Prima facie* directors of a company cannot claim remuneration, and consequently they are not entitled as of right to a remuneration, whether upon a *quantum meruit* or otherwise.⁴³

Accordingly, in the absence of a provision in the articles authorising the payment of remuneration or a contract to that effect, a director would not be entitled to any remuneration.⁴⁴ Where the remuneration is fixed by the articles a director cannot draw any sum in excess of it, or else he can be held guilty of misfeasance.⁴⁵ The matter of remuneration to be paid to a director is however, a matter of internal management.⁴⁶

Remuneration fixed by articles-effect of:—Articles usually provide for payment of such remuneration. Regulation 69 of Table A of the Indian Companies Act provides that remuneration shall, from time to time, be determined by the company in the general meeting. In case of a provision of this nature, a director has no right to remuneration allotted to him by a resolution of the Board of Directors alone.⁴⁷ In the last mentioned case a director's remuneration was fixed by an agreement signed and sealed at a meeting of the Board of Directors of the company which had adopted Table A and was not determined by the company in general meeting as required by Article 69 of Table A aforesaid, and it was held that the agreement was *ultra vires* of the Board and that the director must repay to the company, on its counter

40. *Latchford Premier Cinema v. Ermion* (1931) 2 Ch. 409.

41. *Moscely v. Coffy Fontein* (1910) 2 Ch. 382.

42. *Simson v. Westminster Palace Hotel Co* 8 H.L.C. 712 and *New Zealand Gold Extraction Co v. Peacock* (1894) 1 Q.B.D. 622.

43. *Dunstin v. Imperial Gas Co.* 3 B & Ad. 125.

44. *George Newman & Co* (1895) 1 Ch. 673 (686).

45. *White Hall Count, in re.* 56 L.T. 280.

46. *Bourneland v. Earle* (1902) A.C. 83.

47. *Marine Products Ltd.*, 44 T.L.R. 292.

claim, the money paid to him under the agreement. Again, where the remuneration is fixed by the articles, it cannot be altered without a special resolution. ⁴⁸

Agreement renouncing remuneration—binding nature of:—An agreement by directors with the company to renounce their right of remuneration is binding on them. ⁴⁹ Accordingly, where the directors of a company passed a resolution that no fee should be paid to them till it should be resolved otherwise, it was held that a resolution was not a mere act of benevolence on the part of directors but was intended to induce the company to carry on its business and that, therefore, no claim could be made or proved in the liquidation of the company by a director in respect of his fees subsequent to the date of the resolution aforesaid. ⁵⁰

Extra remuneration—when payable:—Extra remuneration may be paid to a director as a gratuity while the company is a going concern, provided it is consistent with the articles. ⁵¹ A director is not, however entitled to any remuneration beyond that which is sanctioned by the Articles of Association for doing an act which it would be otherwise his duty as director to do. ⁵² In the last mentioned case, the director claimed a certain remuneration over and above that sanctioned by the articles of the company, on the ground of having helped in the promotion of another company. One of the objects of the promoter company, of which he was the director, was to promote other companies. The following extracts from the judgment are worthy of note in this connection:—"The proposition of law that a director of a company is not entitled to any remuneration beyond what have been sanctioned by the Articles of Association for doing an act which it would be his duty as a director to do, has not yet been questioned by the learned counsel for the respondent. This is a clear proposition of law. The directors are agents of the company, viz, all the shareholders who constitute the company, and, therefore, stand in the same position as an agent to the principal...On the fact it is clear that the plaintiff is claiming remuneration for doing something which it was the duty of directors to do.....The plaintiff cannot, in our opinion, obtain anything over and above what has been fixed as the remuneration by the Articles of Association and the claim was, therefore, not maintainable."

Travelling expenses in addition to remuneration—when allowed:—The remuneration of directors covers travelling expenses and unless specially authorised by the Articles of Association or by resolution of a general meeting, such expenses must not be paid in addition. ⁵³

Right to set off remuneration against call money:—Where the director owes money to the company on his calls, the company cannot adjust the fee towards the amount due to it without the consent of the director. ^{54,5}

48. *Boshack Proprietary Co. v. Fuke* (1906) Ch. 148. (163).

49. *West Yorkshire Darracq Agency v. Coleridge* (1911) 2 K.B. 326.

50. *Re. Porter William & Co. Ltd.*, (1937) 2 All. E.R. 36.

51. *Hutton v. West Cork Ry.* 23 Ch. D. 654.

52. *Dikshit & Co. v. Mathra Prasad* A. I. R. (1925) All. 71.

53. *Young v. Naval & Military Co operative Society* (1905) 1 K. B. 697.

54-5. *Punjab Electric Power Co v. Suraj Kishan* A. I. R (1936) Lahore 62.

Remuneration—when ceases:—The remuneration ceases from the moment when the director ought to have vacated his office, ⁵⁶. He may, however sue on *quantum meruit* if the company has made use of his services thereafter. ⁵⁷

Remuneration need not necessarily be paid out of profits:—It is not necessary that a director's remuneration should be paid out of profits, but may be paid out of general assets, unless the articles of the company state that it must be paid out of the profits. ⁵⁸ There is, however, no such rule that the remuneration can only be paid out of profits. (*Ibid*).

Different remunerations for different directors valid :—It is competent for a company under properly framed articles to fix different remunerations for different directors. ⁵⁹

Suit for remuneration :—A director can sue for remuneration agreed to be paid to him by the company. ⁶⁰ and where the company goes into liquidation, he may also prove it like an ordinary creditor. ⁶¹

PROCEEDINGS OF DIRECTORS

Meetings of Board of Directors :—The directors of company must, as a general rule, act at board meetings, and it is not sufficient to procure the separate authority of a sufficient number of directors to constitute a quorum, ⁶² unless the regulations of the company otherwise provide. Questions arising at such meetings are decided by majority of votes, and in the case of an equality of votes, the chairman usually exercises, in addition to his original vote, a second or casting vote. (*vide*. Regulation 87 of Table A). The articles, however, not infrequently provide that a resolution in writing signed by all the directors or passed by circulation and assented to by a majority of them shall be effective as one passed at a board meeting. In a case of this kind, a resolution signed or passed as aforesaid will be quite valid and binding.

CONDITIONS PRECEDENT FOR A VALID RESOLUTION

(a) **Condition as to due notice :**—*Prima facie* a meeting of the board of directors must be duly convened, after a reasonable notice to every director, ⁶³ for a meeting is not duly convened unless due notice is given to all the directors. ⁶⁴ Articles of a company may, sometimes, provide that meetings will be held at a fixed time specified therein, and in such a case it may be arranged that no notice need be given ⁶⁵ Again, the notice need not specify the nature of business to be transacted

56. *Consolidated Nickel Mines* 1 Ch. 883 (1914)

57. *Crevia Ellies v. Canons Ltd.* (1936) 2 K. B. 403.

58. *Lundy Granite Company* (1872) 26 L. T. 673.

59. *Foster v. Foster* (1916) 1 Ch. 531 (545).

60. *Nell v. Atlantic Gold and Silver Consol Mines* (1895) 11 T.L.R. 407 (C. A.)

61. *Beckwiths Ex parte.* (1898) 1 Ca. 324; *Dale and Plant* 43 Ch. D. 255.

62. *Arcy v. Tamar etc. Co* L. R. 2 Ex. 158 and *Haycraft Gold Reduction & Mining Co.* (1920) 2 Ch. 230.

63. *Browne v. La Trinidad & Co.* (1887) 37 Ca. D. 1 and *Portuguese Consolidated Copper Mines* (1889) 42 Ch. D. 160.

64. *Ebrahim v. S. I. Industrials.* A.I.R. (1938) Mad. 962.

65. *Browne v. La Trinidad & Co.* (1887) 37 Ch. D. 1.

at the meeting, unless the articles otherwise provide ⁶⁶; nor need it be given to a director abroad, unless when he is within easy reach.⁶⁷

(b) **Condition as to proper quorum**:—Again there must be a proper quorum and the same must not be of persons not competent to vote, *e.g.*, of directors interested in the contract under discussion.⁶⁸ The articles usually fix or empower the directors to fix the quorum necessary for a board meeting. Regulation 88 of Table A, for instance, provides that the quorum necessary for the transaction of the business of the directors may be fixed by the directors and unless so fixed shall (when the number of directors exceeds three) be three. The power to fix a quorum cannot, however, be exercised by less than a majority of the directors at a Board's meeting.⁶⁹ Where no quorum has, however, in fact been fixed, the acts of a major part of directors are valid, unless the construction of articles lead to a contrary intention. Accordingly, where the articles gave the board of directors power to regulate its own business and to fix a quorum, and the board passed, at a meeting, where five out of the six directors, were present, a resolution sanctioning the power-of-attorney to the general manager, without fixing a quorum beforehand, it was held, that the resolution authorising the power-of-attorney was valid.⁶⁹

Invalidity of Resolution:—Unless the conditions mentioned above are fulfilled, a resolution passed by the directors would be invalid.⁷⁰ The invalidity will not, however, affect an outsider who will not, as a general rule, be prejudiced by such irregularities, as he is entitled to assume that everything has been properly done and he need not enquire into the regularity of internal proceedings or the "indoor management".⁷¹ Accordingly it has been held that an irregularity in a meeting of directors for want of notice to all the directors for confirming a transfer of shares does not invalidate the transfer duly made.⁷²

Subsequent Ratification by Board:—A regularly constituted board meeting can always ratify and confirm what was done irregularly and when so ratified or confirmed it will be valid *ab initio*.⁷³

DELEGATION OF POWERS BY DIRECTORS

Prima facie one director alone has no power to act on behalf of the company,⁷⁴ as the directors must act as a board, the company being entitled to their collective wisdom.⁷⁵ But the articles may give power to directors

66. *La Compagnie De Mayville v. Whitley*. (1896) 1 Ch. 788

67. *Halifax Sugar Refining Co. v. Tranchlyn* (1890) 59 L. J. Ch. 591 (593).

68. *Greymouth Point etc., Co.* (1904) 1 Ch. 32.

69. *Ganesh Flour Mills Co. v. Jag Mohan Saran* (1942) 12 Com. Cas. 10.

70. *Homer District Consolidated Gold Mines*. 39 Ch. D. 546.

71. *Royal British Bank v. Turquand* (1856) 6 E. and B. 327 and *Country of Cyloster Bank v. Rudry Merthyr & Co.* (1895) 1 Ch. 629.

72. *Peninsular Life Assurance Co.* 37 B. L. R. 1901: 160 I. C. 638.

73. *Portuguese Consolidated Copper Mines Co., in re. Badman, Ex parte* (1890) 45 Ch. D. 16 (26).

74. *R. N. Cunningham & Co.* 58 L. T. 16.

75. *Marsilles Extension Railway Co.* 7 Ch. A. 161 (168); *Haycraft Gold Reduction etc. Co.* (1900) 2 Ch. 230 (235).

to delegate to any one or more of themselves any of their powers. A specific authority in the articles in this respect is necessary in order to enable the directors to delegate their powers, as ordinarily they cannot delegate their powers on the principle of *delegatus non potest delegare*.⁷⁶ Such authority may sometimes be an implied one. (Palmer's Company Law, 16th Ed. page 186). Where the articles authorise delegation, a proper delegation may sometimes be presumed, *e. g.*, where a third party acting *bona fide* contracts with one or two directors acting on behalf of the company.⁷⁷ But a person who is not aware of the delegation cannot possibly claim to have the benefit of the above rule.⁷⁸

Nature of delegation :—The word "delegation" does not imply any parting with the power or authority which is the subject of delegation. It merely implies that the person to whom the power is delegated has authority to do that which the person delegating may do himself. Consequently such delegation does not prevent the directors from acting in regard to the matter delegated.⁷⁹

Delegation of powers to a committee of directors:—The directors may, where the articles so permit, delegate any of their powers to a committee, which may even consist of a single director.⁸⁰ Regulation 91 of Table A is an article in point. It provides that the directors may delegate any of their powers to a committee consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors. Directors, while delegating their powers to a committee consisting of more than one member, usually fix the quorum. If, however, no quorum is fixed by the directors, whatever the committee does must, unless the articles otherwise provide, be done in the presence of all the members, though they need not be unanimous.⁸¹ Regulations 92 and 93 of Table A provide for the election of a chairman by the committee and the procedure at their meetings and the decision of questions arising thereat by a majority of votes and, in case of equality of votes, the exercise of second or casting vote by the chairman.

MINUTES OF PROCEEDINGS OF DIRECTORS.

S. 83 of the Act *inter alia* provides that a company shall cause minutes of all proceedings of its directors to be entered in a book kept for that purpose. Any such minutes, if purporting to be signed by a chairman of the meeting at which the proceedings were had or by the chairman of the next succeeding meeting, shall be evidence of the proceedings. Until the contrary is proved every such meeting, in respect of the proceedings whereof minutes have been so made, shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly

76. *Howard's case*, L. R. 1 Ch. A. 563.

77. *Potterdell v. Fareham Blue Brick & Tiles Co.* (1866) L. R. 1 C. R. 674.

78. *Houghton & Co. v. Northard Lowe & Wills* (1927) 1 K. B. 246. But see also *British Thomas Honsten Co. v. Federated European Bank Ltd.*, (1932) 2 K. B. 176

79. *Huth v. Clarke* (1890) 25 Q. B. D. 391.

80. *Fire Proof Doon Ltd.*, (1916) 2 Ch. 145.

81. *Liverpool Household Stores Association, in re.* (1890) 59 L. J. Ch. 616 (624),

had. The minutes are thus, if properly made and signed as aforesaid, presumed *prima facie* to be correct. They are, however, neither conclusive evidence of the proceedings nor are they conclusive on the question of the accuracy or regularity of the statements contained therein, and may, therefore, be contradicted by other evidence.⁸² Accordingly, a bargain or transaction may be proved by other independent evidence, even when it has not been recorded in the minute book. The absence of the resolution relating thereto from the minute book in such a case would no doubt raise a *prima facie* presumption that no such resolution was passed, which may be rebutted by other evidence.⁸³ No such presumption would, however, attach, if the minute book is not properly kept. Accordingly, it has been held that entries made in a number of loose leaves fastened together in two covers are not admissible in evidence within the meaning of S. 120, (S. 83 of the Indian Act), as they do not constitute a 'book' as contemplated by the aforesaid section.⁸⁴ Again it is the duty of the directors to maintain full and accurate minutes of their proceedings in order to avoid a wrong interpretation being placed thereon. As observed by Kekewich, J., in *Re. Liverpool Household Stores*, (1890) 59 L. J. Ch. 616, "Directors ought to place on record, either in formal minutes or otherwise, the purport or effect of their deliberation and conclusions; and if they do this insufficiently or inaccurately, they cannot reasonably complain of inferences different from those which they allege to be right".

Practice of recording and signing minutes:—It is usual for secretary to take note at each meeting of proceedings thereat. He subsequently enters them in a minute book kept for the purpose, which is read at the next meeting of the Board and signed by the chairman, if approved by the meeting aforesaid. The chairman initials any corrections that may be made in the minutes, as a result of their being put to the meeting, before finally signing the same. It is always desirable to make a note in the proceedings of the meeting in which the minutes as to the previous meeting are approved to the following effect:—"the minutes of the preceding meeting were read and signed as correct". Once the minutes have been signed by the chairman, they cannot be altered by striking out or adding anything.⁸⁵ A director present at the meeting at which the minutes of a previous meeting were read and signed is not thereby made responsible for the resolutions passed at the previous meeting, though he may thus be fixed with notice of what has been done thereat.⁸⁶

Non-accessibility of minute book except to certain officers of the company:—The minute book of the proceedings of the directors, being by its very nature con

82. *Baths and Co., v. MacNaghten* (1910) 1 Ch. 430 and *Indian Zedone Co.*, (1884) 26 Ch. D. 70..

83. *Great Northern Salt & Chemical Workers Co.* (1890) 44 Ch. D. 472 & *Tile Works* (1981) 1 Ch. 173; *Fireproof Doors Ltd.*, (1916) 2 Ch. 142 and *Fothill's case* 1 Ch. A. 85.

84. *Hearts of Oak Assurance Co. v. Fowler* (1936) 1 Ch. 76.

85. *Cawley & Co.* 42 Ch. D. 209.

86. *Burton v. Beavan* (1908) 2 Ch. 240; *Land Allotment Co.* (1894) 1 Ch. 634 and *Lucas v Fitzgerald* (1905) 20 T. L. R. 16.

fidential, containing as it does the record of the private affairs of the company, is not open to inspection of the members of the company or the general public, though it is accessible to directors and secretary as also to the auditors for the purposes of the audit.

CHAIRMAN OF THE BOARD OF DIRECTORS.

Usually the articles provide that the directors may elect a chairman of their meetings and determine the period for which he is to hold office. Regulation 90 of Table A makes a similar provision by providing that the directors may elect a chairman of the meeting and fix a period for which he is to hold the office but if no chairman is elected or if, at any meeting, the chairman is not present within 5 minutes of the time for holding the same, the directors present may choose one of their members to be the chairman of the meeting. The articles usually provide that in case of an equality of votes the chairman shall have a second or casting vote. Such a provision has been made in Regulation 87 of Table A.

Where such a provision exists, the casting vote can be validly exercised. Accordingly where there were 2 directors of a company and one of them did not attend a meeting duly summoned but the other (who happened also to be the chairman) met him shortly after in the passage to his office, proposed the election of a third director and, on the same being objected to by the latter, exercised his casting vote and declared the resolution as arrived. it was held that his action as Chairman was valid.⁸⁷ Where, however the articles do not expressly give the chairman a casting vote, it cannot be exercised.

LIABILITY OF CHAIRMAN FOR MONEYS RECEIVED BY HIM

A chairman is not personally liable for moneys received by him in his capacity of chairman and actually expended on matters connected with the Company. Accordingly, where certain sums were received by the chairman on behalf of the Company, in his capacity as such, and the same were actually spent on matters connected with the company, it was held that he could not be made personally liable for the sums so received.⁸⁸

VALIDITY OF DOCUMENTS CREATING A CHARGE ON ASSETS OF COMPANY BY CHAIRMAN

Where the Board of directors has, by a resolution, sanctioned the raising of loan, the chairman of the Board of directors is presumed to be authorised to execute a document creating a charge and such a document executed by him is valid.⁸⁹

87. *Smith V. Parings Mines* (1906) 2 Ch. 193.

88. *Girdhari V Society Belge De Banque* A.I.R. (1939) Lah. 341.

89. *In re India Film Corporation Ltd.*, A.I.R. 1939 Sind 100 (106).

CHAPTER XVII OTHER COMPANY OFFICERS

1. MANAGING AGENTS

The institution of managing agents has received a statutory recognition by the Companies Amending Act of 1936, which has added Sections 87A to 87I in this respect, while Section 2(1) (9A) has defined the term 'managing agent' for the first time.

Definition of the term :—The term 'managing agent' means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement and includes any person, firm or company occupying such position by whatever name called, [S. 2(1)(9A)]. It may be noted in this respect that the definition of the term "managing agent" overlaps the definition of the term 'manager' in certain respects; the common characteristic of both is that both of them are to be in charge of the management of the whole affairs of the company. The distinction between the two, however, is that while the manager, whether under a contract or not, has the management of the company in his hands, there is no agreement between him and the company entitling him to such management, while the appointment of managing agents pre-supposes an agreement entitling him to the management of the whole affairs of the company. Another point of distinction, worthy of note, is that the manager is always subject to the control and directions of the directors, while the managing agents may contract themselves out of such control, for it is possible for the managing agents, by an agreement to that effect, to be independent of the control and supervision of the directors in such respect as may be specifically mentioned in the agreement.

Duration of appointment of managing agents :—The managing agents appointed after the commencement of the Indian Companies (Amendment) Act, 1936, cannot hold office for a term of more than 20 years at a time, while a managing agent of a company appointed before the commencement of the Indian Companies (Amendment) Act, 1936, cannot continue to hold office after the expiry of 20 years from the commencement of the Act aforesaid. The last mentioned person may, however, be re-appointed to such office after the expiry of the said term or even before the expiry of the said term of 20 years and in his case the following two provisions introduced by the Amending Act of 1936 hold good :—

(1) The termination of his office shall not take effect by virtue of the provision aforesaid until all moneys payable to him for loans made to or remuneration due up to the date of such termination from the company have been paid:

(2) The managing agent whose term of office is terminated by virtue of the aforesaid provision shall, upon such termination, be entitled to a charge upon the assets of the company by way of indemnity for all liabilities or obligations properly incurred by him on behalf of the company subject, however, to existing charges and incumbrances, if any. (Section 87A).

None of the provisions of Section 87A would, however, apply to a private company which is not the subsidiary of a public company. Thus the maximum term for which a managing agent can be appointed, after the commencement of the Indian Companies (Amendment) Act of 1936, has been fixed at 20 years at a time, though there is no bar to their being reappointed for a further term of 20 years, if the shareholders so choose. The managing agents holding office as such before the commencement of the Amending Act of 1936 will cease to hold office 20 years after the commencement of the Amending Act, 1936, unless they are re-appointed thereto before the expiry of the said period of 20 years. It would, however, appear from the wording of the Section 87A that a managing agent could stay on for an indefinite period if his dues are not paid off.

Removal of managing agents:—Notwithstanding anything to the contrary contained in the Articles of Association or in agreement with the company, a company may by a resolution, passed at a general meeting of which notice has been given to the managing agent in the same manner as to the members of the company, remove a managing agent, if he is convicted of a non-bailable offence in relation to the affairs of the company punishable under the Indian Penal Code. Where the managing agent is a firm or company, an offence by a member of such firm or by a director of, or an officer of, the company holding a general power-of-attorney from such company shall be deemed to be an offence committed by such firm or the company, provided, however, a managing agent shall not be liable to be so removed if the offending member, director or officer as aforesaid is expelled or dismissed by the managing agent within 30 days from the date of his conviction or if his conviction is set aside on appeal. [Section 87B (a)].

Reference in this connection may also be made to clause (f) of S. 87B, which provides, *inter alia*, that the removal of a managing agent shall not be valid unless approved by the company by a resolution at a general meeting of the company. The purpose of the said clause (f) is to prevent the appointment (other than appointment of a company's first managing agent) or dismissal of a managing agent to a company without the shareholders in general meeting giving their assent. The clause obviously assumes that a managing agent may be removed by an ordinary resolution of the shareholders in general meeting. This is ordinarily true. Where, however, the articles of association of the company prescribe a certain procedure, (e.g., an extraordinary resolution passed at an extraordinary general meeting at which persons holding not less than three fourth of the issued ordinary capital of the company are present) for the removal of the managing agent, and thus, without contravening the provisions of S. 87B (f), the said procedure goes beyond those provisions, it is perfectly valid, and accordingly, in such a case, the managing agent cannot be validly removed by an ordinary resolution of the General meeting.¹

Dismissal of managing agents:—The same principles as are applicable between a master and servant with regard to the latter's misconduct to justify termination of his employment by the former govern the case of a company and its managing agent. Accordingly, where the quarrels between the partners of the firm

1. *Ramkisesandas v Satyacharan*, 50 C. W. N. 310.

of managing agents were such as to be detrimental to the interests of the company, the termination of the employment of managing agents was held to be justified. ²

Vacation of office of managing agents:—The office of a managing agent shall be vacated if he is adjudged insolvent. [Sec. 87B (b)]. Thus it would seem that the office of managing agent is automatically vacated on his being adjudged insolvent. He must, however, be adjudged insolvent by a competent Court of law before he vacates such office. Mere commercial insolvency without such adjudication would not be enough for the purpose.

Assignment of office of managing agent:—The transfer of his office by a managing agent is void unless approved by the company in general meeting. [Sec 87B (c)]. An exception is, however, provided to the last mentioned provision by the proviso which enacts that a change in the partners of a firm of managing agents shall not be deemed to operate as a transfer of office of the managing agents so long as one of the original partners shall continue to be a partner of the managing agent's firm. The original partner has been defined to mean, in the case of managing agents, appointed before the commencement of the Indian Companies (Amendment) Act, 1936, partners who were partners at the date of the commencement of the said Act and in the case of managing agents appointed after the commencement of the said Act, partners who were partners at the date of the appointment. Thus a change in the constitution of the firm of managing agents would not be deemed to be a transfer of the office of managing agents so long as one of the original partners continues in the firm. But if all the original partners go out, the managing agency will be deemed to have been transferred so as to attract the provision aforesaid.

Effect of a charge or assignment of remuneration by managing agents:—A charge or assignment of his remuneration or any part thereof effected by a managing agent shall be void against the company. [Sec 87B (d)]. The effect of this provision is that if the charge or assignment of his remuneration or any part thereof is created by the managing agent it will not be binding on the company, though it may be binding as between him and his transferee.

It may, however, be noted in this connection that the restriction contained in Sec 87B (d) of the Act mentioned above is against a managing agent making a voluntary charge or assignment of his remuneration, and the object is to prevent him from doing so to the detriment of the company. It is, however, an entirely different matter when a creditor of a firm of managing agents seeks to recover his debt by attaching the remuneration to which the managing agent is entitled. A restraint on voluntary alienation does not bar a compulsory sale at the instance of a creditor. Nor does such remuneration constitute a right to personal service within the meaning of Sec. 60(1) (f) of the Code of Civil Procedure, so as to be immune from attachment. ³

Rights of managing agents on winding up:—If a company is wound up either by the Court or voluntarily, any contract of management made with a managing agent shall be thereupon determined without prejudice, however, to the right of the

2. *Morarji Goculdas v. Sholapur S. & W. Co. Ltd.*, A. I. R. 1944 P. C. 17.

3. *Pursottandas Gujrati and others v. Brijnath Prosad and others* (1941) 11 Com. Cas. 197 (Cal).

management to recover any moneys recoverable by the managing agents from the company, provided that where the Court finds that the winding up is due to the negligence or default of the managing agent himself, the managing agent shall not be entitled to receive any compensation for the premature termination of his contract of management. [Section 87B (c)]. The effect of this provision obviously is that in case of companies being wound up the managing agency automatically terminates though the managing agent can claim compensation from the company for the premature termination of the agency, unless it is found that the winding up has been due to the negligence or default of the managing agent. In the last mentioned case he will not be entitled to receive any compensation for the premature termination of the contract of management. Reference in this connection may also be made to the first chapter of this book wherein claim for damages for premature loss of service of managing agents has been discussed.

General provision as to the appointment or removal of the managing agent and variation of his contract:—Sub-section (f) of Sec. 87B enacts a general provision that all appointments and removals of managing agents and any variation of the managing agent's contract of management made after the commencement of the Indian Companies (Amendment) Act, 1936, must be approved by the shareholders of the company at a general meeting before they can be valid, notwithstanding anything to the contrary in Section 86E. An exception to this provision has been provided by a proviso which enacts that the above provision shall not, however, apply to the appointment of the company's first managing agent made prior to the issue of the prospectus or statement in lieu thereof, where the terms of the appointment of such managing agent are set forth in the prospectus or the statement in lieu thereof.

Making or variation of contract appointing a managing agent in which any director is interested:—Where a company enters into contract for the appointment of a managing agent, in which any director of the company is directly or indirectly concerned or interested, or varies any such existing contract, the company must, within 21 days from the date of the making or variation of the same, send an abstract of the terms of such contract or the variation thereof, as the case may be, together with a memorandum indicating the nature of the interest of the director in such contract, to every member. The contract itself must also be kept open to the inspection of any member at the registered office of the company. [S. 91-C.]

Remuneration of managing agent:—Where a company appoints a managing agent after the commencement of the Indian Companies (Amendment) Act, 1936, the remuneration of the managing agent must be a sum based on a fixed percentage of the net annual profit of the company, with provision for a minimum payment in the case of absence of or inadequacy of profits, together with an office allowance to be defined in the agreement of management. Any stipulation for remuneration additional to or in any other form than the remuneration specified above shall not binding on the company unless sanctioned by a special resolution of the company. The 'net profits' referred to above has been defined to mean the profits of the company calculated after allowing all the usual working charges, interests on loans and advances, repairs and outgoings, depreciation, bounties or subsidies received from the Government or from a public body, profits by way of premium of shares sold,

profits on sale proceeds of forfeited shares, or profits from the sale of the whole or part of the undertaking of the company but without any deduction in respect of income tax or super tax or any other tax or duty on income or revenue or for expenditure by way of interest on debentures or otherwise on capital account or on account of any sum which may be set aside in each year out of the profits for reserved or any other special funds. The above provision shall not, however, apply to private companies, except a private company which is a subsidiary company of a public company or to any company whose principal business is the business of insurance. (Section 87C).

Loan to managing agents:—Sub-section (1) of Section 87D prohibits the making of any loan or guaranteeing any loan to a managing agent of the company or to any partner of the firm of the managing agency if the managing agent is a firm or to any director of the private company, in case the managing agent is a private company. But the prohibition aforesaid does not prevent current account being maintained by the managing agents with the company for the purpose of the company's business subject to the limits previously approved by the Board of Directors [S. 87D (2)]. In the event of any contravention of the aforesaid provision any director of the company who is a party to the making of loan or the giving of guarantee shall be punishable with a fine which may extend to Rs. 500 [S. 87D (3)], and if default is made in repayment of the loan or discharging the guarantee shall be liable jointly and severally for the amount unpaid. The above provision shall not, however, apply to a private company except private company which is a subsidiary of a public company. [Section 87D (4)].

Restriction on managing agent to enter into contracts with the company:—Except with the consent of the 3/4th of the directors present and entitled to vote on the resolution, the managing agent of the company or the firm of which he is partner or any partner of such firm or if the managing agent is a private company, a member or director thereof, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company. But these provisions shall not affect any such contract for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act of 1936. (Section 87D (5)).

Restriction on managing agent's power of management:—The managing agent cannot exercise in respect of any company of which he is a managing agent, a power to issue debentures or except with the authority of the directors and within the limits fixed by them, a power to invest the funds of the company; and any delegation of any such power by a company to a managing agent shall be void. (Sec. 87G). Thus the power of issuing debentures cannot be delegated to the managing agent and if so delegated shall be void (S. 87G). Again a power to invest the funds of the company can only be exercised by a managing agent under the authority of the directors and must be exercised within the limits fixed by them.

Restriction on business by managing agent:—A managing agent cannot on his own account engage in any business which is of the same nature as and directly competes with the business carried on by a company under his management or by a subsidiary company of such company (Sec. 87H). The principle underlying the

above provision is analogous to the one recognised by Section 16 of the Indian Partnership Act. The principles laid down by Lindley, L. J., in connection with competing business in case of a partnership are worthy of note :—

" It is equally clear law that if a partner without the consent of his co-partners carries on business of the same nature, as, and competing with that of the firm he must account for and pay over to the firm all profits made by him in that business".⁴

Section 87H, however, does not, specify the consequences which would ensue in case of a managing agent engaging himself in competing business but obviously the principle governing the partnership in such cases would equally apply in this case. Another possible course open to the company would be to claim damages from the managing agent⁵.

Limit of number of directors appointed by managing agents:— Notwithstanding anything contained in the articles of a company other than a private company, the directors, if any, appointed by the managing agents shall not exceed in number 1/3rd of the whole number of directors. [Sec. 87 (I)]. Thus nomination of directors by managing agents has now been limited to the extent above mentioned and no managing agent can nominate more than 1/3rd of the total number of directors.

Restriction on the company under the same management:—(1) No company incorporated after the commencement of the Indian Companies (Amendment) Act, 1936 which is under the management of a managing agent, shall make any loan to or guarantee any loan made to any company, under the management by the same managing agent, and no company, after the expiry of six months from the commencement of the said Act, except by way of renewal of an existing loan, or guarantee given, make any loan to or guarantee any loan made to any such company. But the above provisions shall not apply to loans made or guarantees given by a company to or on behalf of a company under its own management or loans made by or to a company, to or by a subsidiary company thereof or to the guarantees given by a company on behalf of a subsidiary company thereof. [Section 87E (1)]. In the event of any contravention of the provisions above mentioned, any director or officer of the company making the loan or giving the guarantee who is knowingly and wilfully in default, shall be liable to a fine not exceeding Rs. 1,000 and shall be jointly and severally liable for any loss incurred by the company in respect of such loan or guarantee.

(2) A company other than an investment company cannot purchase shares or debentures of any company under management by the same managing agent unless the purchase has been previously approved by an unanimous decision of the Board of Directors of the purchasing company. An investment company means a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities. (S. 87F).

4. *AA's v. Benham* (1891) 2 Ch. 944 (955).

5. *Dean v. MacDowell*, 8 Ch. D 345.

The provision aforesaid is intended to ensure that no portion of the funds of a company can be employed in the purchase of shares or debentures of any company under management of the same managing agents unless such purchase has been previously approved by the unanimous decision of the Board of Directors of purchasing company. An exception has, however, been made in the case of an investment company, which has been excluded from the operation of Section 87F.

2. MANAGING DIRECTOR.

Position of the managing director:—A managing director is nothing but a director with special powers, ⁶ He is an ordinary director with special powers. He is not a clerk or servant entitled to salary in preference to other creditors. ⁷ A director or managing director is in no way servant of the company; he is the agent of the company for carrying on its business. ⁸ He stands on a higher footing than an ordinary director and consequently it has been held that, the duty of a managing director, being of a higher standard than that of an ordinary director, where such managing director is impelled by motive of personal gain in allowing an overdraft and conceals the transaction from the directors of the Bank, he is liable to compensate the Bank for the loss which the Bank has suffered in consequence of the overdraft. ⁹

Appointment of managing director :—The Articles of Association of the Company usually include power for the directors to appoint one or more of their body to be a managing director and to pay him some special remuneration and to delegate to him such powers as may be necessary. Regulation 72 of Table A makes a similar provision. It runs as follows :—

"The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary or commission, or participation in profits or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation or taken into account in determining the rotation of retirement of directors, but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolves that his tenure of the office of managing director or manager be determined".

It may, however, be noted that unless expressly empowered by the articles or by a resolution of the company, the directors cannot appoint one of themselves to office of profit like that of the managing director nor can they delegate power to such managing director. ¹⁰ If, however, a power to delegate exists in the articles, the appointment of managing director, without salary, is not objectionable. ¹¹

6. *Newspaper Proprietary Syndicate* 1902 Ch. 349 (350).

7. *Mussorie Electric Tramway Co. v. Jagmander A. I. R. 1932 All. 141.*

8. *Gulab Singh v. Punjab Co-operative Bank I. L. R. 1943 Lah. 28.*

9. *Liquidator Bank of Oudh v. Nawab Ali Khan, A. I. R. 1926 Oudh 153.*

10. *Boschoek Proprietary Co. v. Fuke* (1906) 1 Ch. 148 (159).

11. *Foster v. Foster* (1916) 1 Ch. 532.

Again if the articles give the power of appointing a managing director to the Board of Directors, as in regulation 72 of Table A aforesaid, such appointment is to be made by the directors and where they exercise their powers, the shareholders cannot interfere,¹² unless the directors are unable or unwilling to act in the matter, in which case the company can exercise the same.¹³

Even if a managing director is appointed for a fixed term, he will lose his office of managing director, if he is not re-elected as a director after his retirement by rotation or otherwise, unless the articles provide, as in the case of Regulation 72 aforesaid, that the managing director, while holding that office, shall not be subject to retirement by rotation.¹⁴ An appointment of managing director made without specifying the period for which it is made, may, however, be determined at any time, and cannot be taken as being for the period the director appointed remains a director.¹⁵ The appointment of a managing director, appointed for the term of a year, and who has complied with his part of the bargain, cannot be revoked by the directors as the power to revoke the appointment must be read as a power to revoke in cases where the company could do so.¹⁶

If the article is in the form of Regulation 72 providing that when the company in general meeting resolves that the tenure of the office of the managing director be determined, his appointment shall be subject to determination, the directors cannot make an agreement which will prevent the company in general meeting from dismissing the managing director.¹⁶

The directors may appoint a managing director for life and if the directors so appoint him for life in pursuance of their powers, the company cannot dismiss him and, in case of his dismissal, he will be entitled to damages.¹⁶ But if the life-director is appointed managing director without specification of the terms for which he will hold the office, he is liable to be removed by the directors.¹⁵ The appointment of the managing director, however, ceases after the winding up order and consequently an appeal by him against the order of appointment of official liquidator does not lie.¹⁷

Powers of managing director :—It is usual for the directors at the time of the appointment of the managing director to specify the powers which the latter will exercise. But an outsider dealing with a company is entitled to assume that the usual and proper powers for carrying on the business have been delegated to him and that he possesses all the powers which as a managing director he would be entitled to have and although it may turn out subsequently that there has been no

12. *Thomas Logan v. Davis* (1911) 104 L. T. 914.

13. *Barren v. Potter* (1914) 1 Ch. 895 and *Foster v. Foster* (1916) 1 Ch. 532.

14. *Bluett v. Stutchbury's Ltd.*, (1908) 24 T. L. R. 469.

15. *Foster v. Foster* (1916) 1 Ch. 532.

16. *Nelson v. James Nelson & Sons*, (1914) 2 K. B. 770 (779).⁴

17. *South Indian Mills Co. v. Shiva Lal Moti Lal*, 40 Mad. 706.

express delegation, the contracts made by him with an outsider will be binding. ¹⁸⁻¹⁹ Accordingly, persons dealing *bona fide* with a managing director are entitled to assume that he has all such powers as he purports to exercise, if they are powers which, according to the constitution of the company, a managing director can have. ²⁰⁻²¹ The following observation of Kanhaiya Lal, J., in *Ram Baran Singh v. Muffasil Bank Ltd.*,²⁰ mentioned above, are worthy of note in this connection :—

"All persons dealing with a company must ascertain the limitations imposed by the Articles of Association, but they are not bound to draw any direct or obvious inferences from the provisions they find there, nor is there any obligation cast upon them to see that such directors are properly appointed or that they have acted exactly in accordance with the manner prescribed therein. (Grant's Law of Banking, 6th. Edition, Page 607) The Articles of Association of the company define the powers of directors as between themselves and the company and unless there is anything in those Articles limiting the powers of the Board of Directors in carrying on the ordinary business of the Corporation, a third party who deals with the directors or with the managers acting under those powers, however, irregularly, is protected if he acts in good faith in his dealings with them".

The managing director is incompetent to forfeit shares, as Board of Directors alone can forfeit them. ²² Similarly the manager or managing agent of a mill company has no implied authority to purchase, on behalf of his mill, the liability of a stranger and still less of their own manager or manager's partner in a private transaction of his own. ²³ But where the managing director of a company attached a condition to the purchase of further shares by a person already a shareholder, that he would, on such further purchase, be appointed a terminal director (*i.e.*, a director for a particular term) under one of the Articles of Association of the company, it was held that the condition was binding on the company, inasmuch as, if the Board of Directors of the company choose to give authority in such matters to their managing director, they are bound by the contract which the latter made, so long as it is not *ultra vires*. ²⁴

Duties and liabilities of managing director:—The duties of a managing director are of a higher standard than of an ordinary director and were such a director impelled by a motive of personal gain in allowing an overdraft and concealing the transaction from the directors of the company, the managing director is liable to compensate the company for the losses which the company has suffered in consequence of the same. ²⁵ Similarly, where the managing director of a limited company obtained an advantage as the result of the sale of certain shares belonging to one of the shareholders of the company, whether the purchase was made in his name

18-19. *Biggerstaff v. Rowatt's Wharfs* (1896) 2 Ch. 93 and *Abdul v. Muffasil Bank A. I. R.* 1926 All. 487.

20-21. *Ram Baran Singh v. Muffasil Bank Ltd.*, A. I. R. 1925 All. 206 and *Dehra Dun Mussoorie Electric Tramway Co. v. Jagminder A. I. R.* 1932 All 141.

22. *Kanshi Ram v. Keshwa Chand* 37 P. R. 1915.

23. *Moti Lal Shivalal v. Bombay Cotton Manufacturing Co.* 27 All. 604 P. C.

24. *S. B. Powell v. S. Sen* 40 All. 45.

25. *Liquidator Bank of Oudh* 1926 Oudh 153.

or in the name of his minor son, it was held that the benefit must go to the owner of the shares that were sold, as the position of the managing director in negotiating and completing the sale was clearly one of a fiduciary character and good faith should be expected and should be insisted upon in any transaction of this description.²⁶ Likewise, where a managing director of a company withdrew a sum of money from the till of the company to enable him to advance a loan on a mortgage mixing his own money with it, it was held that his conduct was something more than a mere error of judgment and that it was a clear case of breach of trust and misfeasance, justifying an action against the managing director under section 235 of the Act.

Failure of managing director to obtain qualification shares within time—effect of, on his remuneration for work done:—Where the plaintiff was appointed a managing director of a company on certain remuneration, but he failed to obtain qualification shares within two months after his appointment, while he actually worked for the company during that time, it was held that the fact the plaintiff did the work under an agreement which was in fact void did not disentitle him from recovering on *quantum meruit*.²⁷

Claim for damages for premature loss of service by managing director:—If a managing director is appointed for certain number of years and the company goes into liquidation he can claim damages for breach of agreement.²⁸ Therein a managing director of a company was held entitled to damages for breach of agreement of service appointing him the managing director of the company for a certain term, when the company went into voluntary liquidation before the expiration of that term, as it could not, by reason of its liabilities, continue its business, even though he had assented to the resolution for voluntary winding up. The appointment of the managing director must, however, be by a regular contract before he can claim damages for the premature loss of office. Accordingly, where the only contract between the director and the company was that contained in or evidenced by the Articles of Association, it was held that his employment as such was conditional on the continued existence of the company and ceased automatically when it was wound up and that consequently he was not entitled to any damages.²⁹

The proviso to S. 87B (f) of the Act expressly provides that where the Court finds that the winding up is due to the negligence or default of the managing agent himself, the managing agent shall not be entitled to receive any compensation for the premature termination of his contract of management. The principle underlying the aforesaid proviso will presumably apply to the case of a managing director as well, in similar circumstances.

3. MANAGER.

Definition of—manager and managing agents compared:—A company usually requires a manager to attend to the various details of its business. He may be a

26. *Co-operative Co. Ltd., Saharanpur v. Bhagwan Dass & Co.* A. I. R. 1930 All. 615.

27. *Craven Ellis v. Cannon Ltd.* (1936) 2 K. B. 403.

28. *Fowler v. Commercial Timber Co.* (1930) 2 K. B. 1.

29. *Farrell (T. N.) Ltd.* (1937) 2 All. E. R. 505.

member of the firm of the managing agents or one of the directors appointed to act as managing director or be actually appointed as the manager under a contract of service. The word manager will not, according to the definition of the term as given in S. 2(1) (9) of the Act, apply to a person who acts once or twice as a manager or who is in charge of the affairs of a company only partially, but he must be "a person who, subject to the control and direction of the directors, has the management of the whole affairs of a company, and includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not". [S. 2(1)(9)]. From the definition aforesaid, it is clear that the manager has to manage the whole affairs of the company under the control and direction of the directors. In this respect he differs from the managing agents, who may, by an agreement to that effect, be independent of such control to the extent provided for in the agreement. The common feature of both, however, is that they have the management of the whole affairs of the company. If, therefore, a person occupying the position of a managing agent calls himself a manager, he shall, nevertheless, be regarded as managing agent and not as manager. [S. 2(1)(9A) Expl.]

Appointment of manager :—The articles usually provide for the appointment of a manager and the powers that may be delegated to him. If, however, they are silent on these points, he may be appointed under a contract of service and the directors may delegate to him such of their powers as in a similar business are usually entrusted to a manager, provided they have been given power of delegation by the articles, for unless power is given to directors to delegate their powers they cannot do so and must themselves do all acts except those as are usually done by servants or agents. Regulation 72 of Table A provides, *inter alia*, that the directors may from time to time appoint one or more of their body to the office of the managing director or manager for such terms and at such remuneration as they may think fit.

A contract for the appointment of a manager in which a director of the company is directly or indirectly interested and the variation of any such existing contract is subject to the provisions of S. 91C of the Act. The last mentioned section imposes upon the company a duty of sending, within 21 days from the date of such contract or the variation thereof, an abstract of the terms of such contract or variation, as the case may be, together with a memorandum clearly indicating the nature of the interest of the director in such contract or variation, to every member. The contract shall also be kept open to the inspection of any member at the registered office of the company.

Where a provision for the appointment of a manager or managing agent is contained in the memorandum of association of a company, it shall not be deemed to be such condition as is contemplated by S. 10 of the Act, and the manager or the managing agent so appointed cannot be heard to say that the said appointment was in the nature of a condition and as such was not alterable except in the mode and to the extent provided for in the Act.

Dismissal of manager :—The relations between a company and its manager are regulated, more or less, by the law applicable between master and servant. A

manager is essentially the agent and servant of the company and if he is guilty of any misconduct, inconsistent with his duty towards his master, he is liable to dismissal. Accordingly, where a manager secretly accepted a commission from persons having dealings with the company, it was held that he could be dismissed without notice and be called upon to pay over the amount so received to the company.³⁰ The following observations of Bowen, L. J. in the last mentioned case are worthy of note:—

“ There can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act, inconsistent with his duty towards his master and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all. If it is a profit which arises out of the transaction, it belongs to the master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it.”

Duties of manager :—Apart from his general duty to attend to the details of the business of the company, the manager has certain statutory duties assigned to him by and under the Act, for which reference may be made to the Chapter relating to “ Statutory Liabilities and Penalties ” *infra*. Some of the more important duties are, however, mentioned below.

(a) *Duty to sign a copy of annual list and summary, etc., to be filed with Registrar :—*

The annual list and summary as contemplated by S. 32 of the Act is to be completed within 21 days of the first or the only ordinary annual general meeting of the company and a copy thereof signed by the manager or the secretary or a director of the company must forthwith be filed with the Registrar, together with a certificate from such manager, secretary or director that the list and summary state the facts as they stood on the day of the general meeting aforesaid. [S. 32(3)]. The manager is jointly and severally liable for the default in the matter.³¹ [S. 32(5)]. Even the *de facto* manager is liable for the default.³¹

(b) *Duty to sign profit and loss account and balance sheet :—*The balance-sheet and profit and loss account or income and expenditure account must be signed by the manager or managing agent (if any) of the company. [S. 133(1)]. The object of the provision requiring a manager to sign the balance-sheet is to fix him with the responsibility as to its correctness. He is criminally liable under S. 282 of the Act, if he wilfully makes in the balance-sheet a statement false in any particular, knowing it to be false. The law is so strict on this point that the person signing a balance-sheet, which is false, as manager, is liable, although he is not, in fact, the manager.

30. *Boston Deep Sea Fishing Co. v. Ansell*, (1888) 39 Ch. D. 339.

31. *Talaram v. Emperor*, 34 I.C. 262 : 14 P.R. 1916 Cr.

The plea that he signed it at directors' request is only an extenuating circumstance to be considered after prosecution. ³²

(c) *Duty to make declaration verified by affidavit in case of a banking company*:—According to S. 277 I of the Act no banking company incorporated after the commencement of the Indian Companies (Amendment) Act, 1936 can commence business unless shares have been allotted to an amount sufficient to yield a sum of at least fifty thousand rupees as working capital and unless a declaration duly verified by an affidavit signed by the directors and the manager that such a sum has been received by way of paid-up capital has been filed with the Registrar.

(d) *Duty to make memorandum of terms of contract in which company is an undisclosed principal*:—A manager of a company (other than a private company not being the subsidiary of a public company), who enters into a contract for and on behalf of a company in which the company is an undisclosed principal, must at the time of entering into such contract, make a memorandum in writing of the terms of the contract and specify therein the person with whom it has been made. He must also forthwith deliver the memorandum aforesaid to the company and send copies thereof to the directors. Such memorandum must also be filed in the office of the company and laid before the directors at the next directors' meeting. If default is made in complying with the above requirements, the contract shall, at the option of the company, be void against the company, and the manager concerned is liable to a fine not exceeding two hundred rupees. [S. 91D].

(e) *Duty of manager to send information to Registrar as to mortgages, charges, etc. and to maintain proper registers*:—It is the duty of the company to file with the Registrar within a prescribed period the particulars of any mortgage or charge, created by the company, of the payment or satisfaction of a debt in respect of which a mortgage or charge has been registered under S. 109 or S. 109A, and of the issues of debentures of a series requiring registration under the Act. Likewise, it is the duty of the company to keep a register of mortgages and charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company, giving in each case the details mentioned in S. 123 of the Act. The manager of the company must be careful that all these and other formalities are complied with. He should, where a receiver of the property of the company has been appointed, see that every invoice, order for goods or business letter issued by or on behalf of the company or the receiver of the company must contain a statement that a receiver has been appointed. It is not within the scope of this book to dilate upon these matters in detail. Reference in this connection may be made to Sections 109 to 125 of the Act.

(f) *Duty to see that securities deposited by the company's employees and proceeds of Employees' Provident Fund are properly applied and invested*:—S. 282B (1) enjoins that all moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company in a special account to be opened by the company in a scheduled

bank and that no portion thereof is to be utilised by the company except for the purposes agreed to. Likewise, S. 282B (2) enjoins on the company to invest all moneys contributed to the Employees' Provident Funds and all accretions thereto only in securities mentioned or referred to in clauses (a) to (e) of S. 20 of the Indian Trust Act and keep them so invested. It is the duty of the manager as also of other officers of the company to secure compliance with the above mandatory provisions. The default in this respect is punishable with a fine upto five hundred rupees. [S. 282B (5)].

Powers of manager :—*Extent of:—*As stated above under "Appointment of manager", the articles usually provide for the powers that may be delegated to manager. In the absence of a provision to that effect in the articles, he may exercise such of the powers as in a similar business are usually entrusted to a manager, provided, however, the directors themselves have been given power of delegation by the articles or else the powers of the manager would be confined to such acts duly, as are usually done by servants or agents. Accordingly it has been held that a manager of a bank is the agent of the bank for performing all ordinary banking transactions and consequently the transfer of a negotiable instrument, being a very ordinary transaction, is well within his powers.³³ The manager or managing director of a mill company has, however, no implied authority to purchase, on behalf of the mill, the liability of a stranger and still less of their own manager or manager's partner in a private transaction of his own.³⁴

*Outsider dealing with manager—position of:—*On the principle of the *Royal British Bank v. Turquand*, [(1856) 6E and B 327], an outsider dealing with a manager or managing director of a company is entitled to assume that the latter possesses all such powers as he purports to exercise, if they are powers, which according to the constitution of the company, a manager or managing director, as the case may be, can have; for a company is liable for all acts done by its officers, even though unauthorised by it, provided such acts are within the apparent authority of such officers and are not *ultra vires* the company. Thus a third party who deals with the directors or with the manager of a company acting under the powers given to such officers by the articles of the company, however irregularly, is protected if he acts in good faith in his dealings with them, as he need not enquire into the regularity of the internal proceedings or the indoor management.³⁵⁻⁶

Assignment of office by manager :—Even if there is a provision in the articles of association of a company or there is an agreement between any person and the company empowering a manager of the company to assign his office as such to another person, an assignment of office made in pursuance of the said provision or agreement is of no effect, unless and until it is approved by a special resolution of the company. [S. 86B]. The last mentioned section seeks to prevent assignment of the

33. *Hindustan Assurance and Mutual Benefit Society v. Gurdit Singh*, A.I.R. 1924 Lah. 462=60 I. C. 74.

34. *Moti Lal v. Bombay Cotton Manufacturing Co.*, 37 All 604 (P. C.)=A. I. R. 1915 P. C. 69.

35-6. *Baran Singh v. Mufassil Bank Ltd.*, 83 I. C. 142. See also *Fountain v. Carmarthen Ry. Co.*, 5 Eq. 316 and *County of Gloucester Bank v. Rundry Merthyr Steam and Colliery Co.* (1895) 1 Ch. 629.

office of the manager in spite of special agreement authorising such assignment, unless and until it is approved by a special resolution of the company. The reason of the above rule is that a contract of service, being based upon personal considerations, *e. g.*, character, credit and substance of the party concerned, should not be allowed to be assigned.³⁷

4. SECRETARY.

Position of secretary:—The secretary of a company is to all intents and purposes its agent through whom the clerical work of the company is usually carried on. He is included within the definition of 'officer' as given in Section 2 (1) (11) of the Act. He is usually entrusted with the work of taking down the minutes, circulating the agenda and doing other works in connection with the meetings of the Board of Directors. He is a servant of the company.³⁸ He must obey the orders of the directors and give effect to their resolutions and for this purpose he will conduct the ordinary correspondence of the company or direct the clerks to do so. He has thus to issue notices, send circulars, write letters, etc., and answer enquiries. His position has been correctly summed up by Lord Esher³⁹ as follows:—

"The secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all".

In this receipt it must, however, be noted that although he must obey the orders, he must not do that which he knows to be wrong to, or a fraud upon another person.

Duties of secretary:—From what has been stated in the preceding paragraph, it at once becomes clear that the secretary is the mouthpiece and instrument of the company so far as any ministerial acts are concerned. He must see that the books of the company, particularly the books required to be maintained under the Act, *e. g.*, register of members, etc., are properly maintained and written. He must also see that the minutes of all proceedings of the meetings of the directors or of the members are duly recorded in the minute book of the company; and for this purpose he usually takes down notes of what transpires at such meetings. He must make all necessary returns to the Registrar of the companies. He is generally responsible for the correspondence of the company. He must give effect to the resolutions of the board and obey other directions and orders of the directors but in doing so must see that the provisions of the Act and of the Memorandum and Articles of Association are complied with. He must see that the transfer of shares is in order. His duties include *inter alia*, certifying transfers and receiving and registering notices of transfers on behalf of the company, but if the same person is the secretary to two companies, knowledge acquired by him as secretary of one company cannot be treated as the knowledge acquired by the secretary of the other company, unless

37. *Tolhurst v. Associated Portland Cement Manufacturers Ltd.*, (1902) 2 K. B. 660 and *Grace Humble v. Hunter* (1848) 12 Q. B. 310.

38. *Cairney v. Back* (1906) 2 K. B. 746.

39. *Barnet Horses Co. v. South London Tramway Co.* [18 Q.B.D. 814 (817)].

there is duty to indicate the knowledge. Accordingly, knowledge acquired by him for one company is not notice to the other.⁴⁰ Likewise, a notice received by the secretary when not received in the course of company's business or under such circumstances that it is his duty to communicate to the company, is not a notice to the company.⁴¹

The common seal of the company is usually affixed in his presence. The articles of the company generally provide that he may, together with one or more of the directors, authenticate the use of such seal.

Powers of secretary :—It has been observed above that the position of a secretary is that he is to do what he is told and no person can assume that he has any authority to represent anything at all, and consequently a secretary has no power to bind the company by a representation as to the affairs of the company so as to induce people to take shares.⁴²

Accordingly, a person induced by a fraudulent misrepresentation of the secretary of the company to purchase shares, not authorised by nor known to the company's officers authorised to make a representation, cannot maintain an action for rescission of contract or for damages against the company.⁴³ The principle underlying the above decision seems to be that the company is not bound by the representation made by its secretary outside the scope of his duty. The law on the point as settled by the House of Lords⁴⁴ is, that a master is liable for the wrongs of his servant or agent acting within the scope of his authority, while committed in the course of former's service, whether the same is committed for the benefit of the master or for the benefit of the servant or agent. Accordingly, it has been held in the last mentioned case that the company would be liable in an action for deceit, if the secretary was acting in the course of his employment, even though the fraud was committed for his own benefit.

The company will not, however, be liable in case of fraud of the secretary in certifying transfers,⁴⁵ nor is the company liable on a share certificate if the secretary fraudulently affixes the seal of the company and forges the name of the director.⁴⁶ The principle underlying the last mentioned decision seems to be that forgery stands on a different footing altogether, the forged documents being wholly null and void. Accordingly, where a secretary forged the signatures of a director to a cheque which was paid by the Bank, it was held that the company was entitled to repudiate the cheque and recover the amount from the Bank.⁴⁷

The secretary has no power to register a transfer until it is passed by the directors of the company or to convene a general meeting unless authorised by the

40. *Fenwick Stohart & Co. Deep Fishery Co's Claim* (1902) 1 Ch. 507.

41. *Societe Generale v. Walker* (1885) 14 Q.B.D. 424.

42. *Barnett Hearses Co. v. South London Tramway Co.* 18 Q.B.D. 814 (817).

43. *Dewan Chand v. Gujranwala Sugar Mills Co.* A. I. R. 1937 Lahore 644.

44. *Lloyds v. Grace Smith & Co.* 1912 A.C. 716.

45. *George White Church Ltd., v. Cavanagh* (1902) A. C. 117.

46. *Ruban v. Great Fingall Consolidated Co.* (1906) A. C. 439.

47. *Kepitigala Rubber Estates v. National Bank of India* (1909) 2 K. B. 1010.

Board of Directors to do so,⁴⁸ nor to strike off a name from the register of members.⁴⁹ A secretary cannot be allowed to treat a resolution dismissing him from his post passed by the company in general meeting as void, even if the same is irregular for want of proper notice, especially when the same has been accepted and acted upon, as such resolution is a matter within the powers of the company.⁵⁰

Liabilities of secretary :—A secretary who in fact acts as a manager is liable for negligence in preparing false balance sheets and accounts causing dividend to be paid out of the capital.⁵¹ He is also liable for misfeasance, if he receives an improper commission;⁵² but he is in a very different position from directors and cannot be fixed personally with liability for a misapplication by them of company's fund, though he may have known all about it.⁵³ Where a secretary having plenary power to enter into a mortgage on behalf of the company thinks it advisable to take the sanction of the directors, though it was not necessary for him to seek such sanction, without disclosing to them his interest in the mortgage, which he was bound to disclose, he cannot subsequently take shelter in the fact that he could have himself sanctioned the mortgage.⁵⁴

Statutory duties and liabilities of secretary :—See the chapter relating to "Statutory Liabilities and Penalties" *infra*.

Secretary whether a "clerk or servant" within the meaning of S. 230 of the Act :—A secretary may be treated as a clerk or servant entitled to rank as preferential creditor under Section 230 of the Act if he gives his whole time to the company but not when he performs his duties by a deputy.⁵⁵

5. LEGAL ADVISER.

Meaning of the term :—The word 'legal adviser' means and includes solicitors, pleaders, barristers and other legal advisers. [Indian Companies Act by Sircar & Sen—page 216]:

Appointment of solicitor or legal adviser :—The appointment of a solicitor or legal adviser, like the appointment of any other officer of the company, should usually be secured by a definite contract with the company after its incorporation. Sometimes he is nominated in the Articles of Association but the mere statement in the Articles that he has been appointed as such does not constitute a contract between him and the company though it may be held to be evidence of the terms on which the company has agreed to employ him.⁵⁶

48. *Chida Mines Ltd.*, *Anderson* 22 T. L. R. 27.

49. *Wheatcrafts Case* (1873) 29 L. T. 322 (324).

50. *Tanjore Permanent Fund Ltd. v. Sadastva Rao* A. I. R. 1926 Mad. 705.

51. *Municipal Freshold Land Co. v. Pollington* (1890) 63 L. T. 243.

52. *Barrow's Case* 28 W. R. 34.

53. *Joint Stock Discount Co. v. Brown* (1869) 8 Eq. 396.

54. *Pydh Venkatachalapathy v. Guntoor Cotton etc. Mills, Co.* A. I. R. 1929 Mad. 353.

55. *Carine v. Back* (1906) 2 K. B. 746.

56. *Eley v. Positive Government Assurance Co. Ltd.*, (1876) 1 Ex. D. 20 and *Browne v. La Trinidad* (1888) 37 Ch. D. 1.

In *Eley v. Positive etc.*, referred to above, there was a clause in the articles providing that a certain solicitor should be employed, for life and should not be removed except for misconduct. He was so employed and later on became a shareholder also. On his services being dispensed with prematurely he brought a suit against the company but the Court refused him the relief mainly on the ground that the article in question did not create a contract with the solicitor so as to give him a right to damages on the refusal of the company to employ him. Lord Cairnes L.C., observed during the course of his judgment as follows :—

" This article is either a stipulation which is binding on the members or else a mandate with the directors; in either case it is matter between directors and the shareholders and not between them and the plaintiff".

The aforesaid case was followed in *Browne v. La. Trinidad* mentioned above. The rule laid down in the last mentioned decision has, however, been slightly modified by the Court and it has been held that a binding contract on the terms of certain articles may be implied by the acts of parties and under certain circumstances such an implied contract may be proved, even if the articles are held not to constitute a contract in themselves.⁵⁷ In view of what has been stated above, it is always safe that the appointment should be secured by a resolution of the Board or by a definite agreement executed by the company after its incorporation.

In the absence of an agreement to the contrary providing that the company will exclusively employ a specific person as its solicitor or legal adviser, the company is at liberty to employ any other person for any of its business.

Duties of solicitor or legal adviser :—The duty of a solicitor is to advise the company in all matters referred to him for advice. He is only an adviser with no authority and his advice may be accepted or rejected. He may attend board meetings or be present at general meetings to advise the directors. In all questions as to increasing or reducing the capital of the company, issuing shares or debentures, forfeiting shares and in all other important matters, *e.g.*, passing of special resolutions or resolutions as to winding up or undertaking any scheme of reconstruction or amalgamation, it is advisable that he should be consulted beforehand so as to minimise the chances of serious mistakes which may sometimes involve the company in considerable expenses and complications. It may be that sometimes the mistakes may be such that it cannot afterwards be rectified, *e.g.* where a company passed a resolution for winding up with view to reconstruction and thereafter found that the scheme for reconstruction could not be carried out.⁵⁸

It is the duty of legal adviser to give the Advocate General or the Public Prosecutor, to whom the matter as to prosecution of any person guilty of an offence in relation to the company has been referred to by the Local Government under S. 141 A of the Act, and who considers that the case is one in which a prosecution ought to be instituted, all assistance in connection with the prosecution which he is reasonably able to give. [S. 141A].

57. *Isaac's case* (1892) 2 Ch. D. 198 & *Beckwith's case* (1898) 1 Ch. D. 324 followed in I. L. R., 1943 Lab. 28.

58. *Thomson v. Henderson's Transvaal Estates* (1908) 1 Ch. 765.

Declaration by an Advocate, Attorney or Pleader:—Sub section (2) of Section 24 of the Act prescribes a declaration by an advocate, attorney or pleader, entitled to appear before a High Court, who is engaged in the formation of a company, as to compliance with all or any of the requirements of the Act. Such a declaration must be filed with the Registrar of the Joint Stock Companies before a company can be registered and the Registrar may accept such a declaration as sufficient evidence of compliance.

Notice of demand under Section 163 of the Act:—Prior to the passing of Indian Companies (Amendment) Act of 1936 it has been held in a series of cases that a statutory notice of demand must be made by the creditor himself under his own hand and that a notice of demand by an advocate or that of any other agent or solicitor of the creditor, did not satisfy the requirements of Section 163.⁵⁹ The Amending Act of 1936 has done away with this formality by adding sub-section (2) to Section 163. The last mentioned sub-section provides that the demand referred to in sub-sec. (1) shall be deemed to have been duly given under the hand of the creditor, if it is signed by an agent or legal adviser duly authorised on his behalf or, in the case of a firm, if it is signed by such agent or by a legal adviser or any one member of the firm on behalf of the firm.

Legal Assistant to official Liquidator:—Section 181 of the Act authorises an official liquidator, with the sanction of the Court, to appoint an advocate, attorney or pleader entitled to appear before the court to assist him in the performance of his duties. Where, however, a solicitor has been appointed a liquidator he cannot appoint his partner as a solicitor, unless the latter consents to act without remuneration.

Such appointment should not, however, be obtained *ex parte* and where this is so obtained, the Court should accede to a request for reconsideration of its *ex parte* decision on significant facts being brought to its notice which were not previously within its cognizance. The interests of the creditors of the company are involved in the selection by the liquidator of a firm of solicitors which was not previously concerned in the proceedings and where the proceedings are complicated and have gone on for sometime and the petitioner-creditor's attorneys are acquainted with the proceedings and a new firm of solicitors would require the expenditure for a considerable time and labour in becoming familiar with them, the petitioner-creditors' firm of solicitors should be preferred, being clearly in a better position to assist the liquidator than a new firm.⁶⁰ In complicated cases, however, the liquidator should be advised by a counsel dis-associated from either side.⁶¹

If the sanction as contemplated by the above section is not taken, the liquidator might be personally liable for the payment of the pleader's fee. But absence of the leave will not, however, invalidate the acts of such pleader, in instituting or conducting the case.⁶²

59. *Kureshi v. Argus Footwear I. L. R. 9 Rangoon 343 and Hanley's Telegraph Works Co. v. Gorakhpore Electric Supply Co., A. I. R. 1936, All. 840 and Japan Cotton Trading Co. Ltd., v. Jajodia Cotton Mills, I. L. R. 54 Cal. 345.*

60. *Jamna Das Nursery Ginning etc., Co., in re. A. I. R. 1935 Bom. 337.*

61. *Ripon Press Co. v. Gopal Chetty A. I. R. 1932 P. C. 1.*

62. *Kathiawar and Ahmedabad Banking Corporation v. Gurdas Ram I. L. R. 5 Lahore 414.*

Office of profit by legal adviser, while acting as director :—Section 86E prohibits a director not to hold an office of profit under the company without the consent of the company in general meeting but exception has been made *in ter alia* in favour of a legal adviser, when he happens also to be a director of the company. The office of the legal adviser is not considered to be such an office as to debar him from being a director of the company. It is, however, doubtful if he is entitled to the exemption when he does the work of the company on a fixed salary.⁶³

Costs of solicitor before incorporation of the company :—If a solicitor incurs costs in or about the formation of a company, he must get payment from the promoter or secure a definite contract with the company after its incorporation for inasmuch as the power of the company in its articles to pay the preliminary expenses of formation does not give the solicitors any rights to be paid expenses they have incurred or costs which have accrued to them.⁶⁴

Costs of solicitor in winding up :—The solicitor is not entitled to claim his costs against the liquidator personally, as the Court presumes in such cases that he gives credit to the assets and when such assets are insufficient to pay his costs, he takes the risk of losing them.⁶⁵ Thus his right is only to be paid his costs out of the assets of the company.⁶⁶ He may, however, have a lien for his costs on any moneys which may be recovered through his instrumentality before or during the winding up and he is entitled to be paid before the unsecured creditors of the company receive any dividend. Where such costs are directed to be paid by the liquidator or out of the assets against the company in liquidation, they are to be paid in priority if the assets are insufficient to pay such costs, after payment of the costs of the winding up.⁶⁷

Solicitor not ordinarily a promoter :—A solicitor does not become a promoter of the company by reason of his acting in professional capacity for persons engaged in the promotion. He may, however, become so by doing other acts.⁶⁸

6. AUDITORS

Position of auditors :—Auditors are essentially agents of the shareholders, to whom they should give assurance that the balance sheet and the report of directors are *bona fide* and correct statements of the affairs of the company, but though they are agents of the company, a constructive notice of facts coming to their knowledge is not imputed to the shareholders of the company.⁶⁹

Appointment of first auditors of the company :—The first auditor of the company may be appointed by directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the members of the company in general meeting. In the

63. *Liberator Permanent Benefit Building Society*, 71 L. T. 406.

64. *English and Colonial Produce Co.* (1906) 2 Ch. 435.

65. *Anglomorian etc. Co.* 1 Ch. D. 130.

66. *Ex parte Watkin* (1876) 1 Ch. D. 130.

67. *Home Investment Society* 14 Ch. D. 167.

68. *Turner, in re.* (1884) 53 L. J. Ch. 42 and *Simmon v. Liberal Opinion* (1911) 1 K. B. 966.

69. *Spackman v. Evans* L.R. 3 H. L. 171.

last mentioned case, such members at that meeting may appoint auditors in their stead. [Section 144 (7)]. Where the shareholders remove an auditor the Court will not grant an injunction restraining the company from removing him, for it is not the function of the Court to force on the unwilling company an auditor whom it does not want to retain. ⁷⁰

Subsequent appointment of auditors:—Under the Act every company shall, at each annual general meeting, appoint an auditor or auditors to hold office till the next annual general meeting [S. 144 (3)]. If an appointment of an auditor is not made at annual general meeting, the local government may, on the application of any member of the company, appoint an auditor of the company for the current year and fix the remuneration to be paid to him by the company for his services [Sec. 144 (4)]. A person other than a retiring auditor cannot be appointed auditor at an annual general meeting unless notice of intention of nominating that person to the office of auditor has been given by a member of the company, to the company not less than 14 days before such annual general meeting, and the company must send a copy of any such notice to the retiring auditor and must give notice thereof to its members either by advertisement or in any other mode allowed by the articles not less than 7 days before the annual general meeting. [S. 144(6)] But if after notice of intention to nominate an auditor has been given to the company, an annual general meeting is called for a date 14 days or less after the notice has been given, the above requirements as to time in respect of such notice shall be deemed to have been satisfied and the notice to be sent or given by the company may, instead of being sent or given within the time required by this section, be sent or given at the same time as the notice of annual general meeting. [Proviso to S. 144 (6)]. Thus no person other than a retiring auditor can be appointed at an annual general meeting unless a member of the company has given notice to the company not less than 14 days before such annual general meeting of his intention to nominate such auditor. On receipt of this notice the company must send a copy of the same to the retiring auditor and shall also give notice to its shareholders by advertisement or otherwise at least 7 days before the annual general meeting. But where a meeting is called on a date 14 days or less after notice has been received from a member of his intention to nominate a new auditor, notice to the shareholders may be given at the same time as the notice of the annual general meeting. In the last mentioned event no objection can be taken that the requirement of time as to notice aforesaid has not been observed.

Persons ineligible for being appointed auditors:—The following persons namely; (1) a director or officer of the company; (2) a partner of such director or officer; and (3) in case of a company other than a private company not being the subsidiary company of a public company, any person in the employment of such director or officer; and (4) any person indebted to the company cannot be appointed auditor of the company. If a person after being appointed an auditor become indebted to the company, his appointment shall thereupon be terminated and thus he would automatically vacate his office. [S. 144 (8)].

⁷⁰ *Couff v. London and County etc., Co.* (1912) 1 C.L. 440.

Qualification of auditors :—An auditor must be duly qualified *i.e.*, he must hold a certificate from the Governor-General in Council entitling him to act as auditor of companies before he can be appointed. In case of private companies, however, any person, whether qualified or not can act as an auditor but this exemption does not hold good in the case of a private company which is the subsidiary company of a public company. The last mentioned company must be treated as a public company for the purpose of appointment of the auditors. A firm, all the partners whereof practising in India hold such certificates as aforesaid, may be appointed by its firm name to be the auditors of a company and may act in its own name. [Section 144 (1)].

Rules for the grant, renewal etc., of auditor's certificate :—The Governor-General in Council, may, by notification in the Gazette of India and after previous publication, make rules providing for the grant, renewal or cancellation of such certificates and prescribing conditions and restrictions for such grant, renewal or cancellation; provided that nothing contained in such rules shall preclude any person from being granted certificate merely by reason that he does not practise as a public accountant. [S. 144 (2)]. Such rules may provide (a) for the maintenance of a register of accountants entitled to apply for such certificates; (b) prescribe qualifications for enrolment on the register and the fees therefor; (c) provide for the examination of the candidates and prescribe the fees to be paid by the examinees; (d) prescribe the circumstances in which the name of any person be removed from or restored to the Register; (e) provide for the establishment, constitution or procedure of an Indian Accountancy Board, consisting of persons representing the interests principally affected or having special knowledge of accountancy in India, to advise him on all matters of administration relating to accountancy and to assist him in maintaining the standard of qualification and conduct of persons enrolled on the Register; and (f) provide for the establishment, constitution, and procedure of local accountancy boards at such centres as the Governor-General in Council may select, to advise him and the Indian Accountancy Board on any matter that may be referred to them. [S. 144 (2A)].

The holder of certificate granted under the above mentioned provision [Section 144 (2A)] shall be entitled to be appointed and act as auditor of companies throughout British India.

Filling of casual vacancy in the office of auditors :—The directors may fill in casual vacancy in the office of auditors, but while any such vacancy continues the surviving or continuing auditor or auditors, if any may act.

Remuneration of auditors :—The remuneration of the auditors of a company must be fixed by the company in general meeting. The directors have, however, power to fix remuneration of any auditors appointed before the statutory meeting, as first auditors of the company, as also of the auditors appointed to fill any casual vacancy. Except in the above mentioned two cases they have no power to fix the remuneration of the auditors.

Rights and powers of the auditors :—Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company and shall be further entitled to require from the directors and other officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors. [S. 145(1)]. In the case of a banking company having branch banks beyond the limits of India, it shall, however, be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the Head Office of the company in British India. [Section 145 (3)].

The auditors of a company shall be entitled to receive notice of, and to attend, any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company. They may make any statement or explanation they desire with respect to such accounts. [Section 145 (4)].

DUTIES OF AUDITORS.

Duty to acquaint himself with obligations under the law and articles, etc.:—An auditor must make himself acquainted with his duties under the Act.⁷¹ He must also make himself familiar with the obligation or exceptional duties, if any, cast upon him by the articles of association of the company whose accounts he is called upon to audit.⁷² Again, there may be a special contract defining the duties and the liabilities of the auditors. If there is, then that contract governs the question. The articles will, however, be looked at if there is no special agreement. But no agreement or article of association can remove an imperative or statutory duty.⁷³

Statutory duty to make report to shareholders:—The principal duty of auditors is to protect the shareholders, and to see that the directors and the managers are issuing true balance sheet.⁷⁴ The law, therefore, casts a duty on them to make a report to the members of the company on the accounts examined by them and on every balance-sheet and profit and loss account laid before the company in general meeting, during their tenure of office. Such report must state :—(a) Whether or not they have obtained all the information and explanation they require; (b) whether or not in their opinion the balance-sheet and the profit and loss account referred to in the report are drawn up in conformity with the law; (c) whether or not such balance-sheet exhibits the true and the correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company; and (d) whether in their opinion books of accounts have been kept by the company as required by section 130 of the Indian Companies Act. [S. 145 (2)].

The last mentioned section (S. 130) requires every company to keep proper books of accounts with respect to (i) all sums of money received and expended by

71. *Republic of Bolivia etc., Syndicate* (1914) 1 Ch. 139.

72. *Kingston Cotton Mills* (1896) 2 Ch. 284.

73. *City Equitable Fire Insurance Co.* (1925) 1 Ch. 407.

74. *Clifford v. Emperor*, 22 I. C. 432 (Burma).

the company and the matters in respect of which the receipt and expenditure takes place; (ii) all sale and purchase of goods by the company; (iii) the assets and liabilities of the company.

Where any of the matter referred to in clauses (a) to (d) of S. 145 (2) is answered in the negative or with a qualification, the report must state the reason for such answer [S. 145 (2A)].

To whom the report is to be sent:—The auditors are not, however, bound to send such report to every shareholder. It is enough if such their report is forwarded to the secretary or directors of the company leaving them to convene a general meeting to consider the report.⁷⁵ But if the auditors know or have reason to believe that their report is not laid before the shareholders, it is doubtful if they can safely rest content without taking some steps to see that it is communicated to them. (Palmer's Company Law, 16th Ed., P. 221).

Expert advice for formation of opinion—value of:—In forming their opinion as to whether the balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, etc., they may take into account the advice of lawyers and other experts, but they cannot take shelter under an expert opinion, for they cannot successfully plead that in reporting they expressed the opinion of some expert and not their own opinion.⁷⁶

Compliance with statutory duty—what it may involve:—The compliance with statutory duty of making report to members, as contemplated by Section 145 of the Act, clearly involves a comparison of the entries in the books of the company with the figures in the balance-sheet. This duty is not, however, discharged by merely verifying the arithmetical accuracy of the balance sheet. The auditor must enquire into substantial accuracy and ascertain that the balance-sheet has been properly drawn up so as to contain a true and correct representation of the company's state of affairs.⁷⁷ He is bound to enquire and to take trouble to ascertain, whether the books of the company themselves shew the true position of the company and such investigations must of necessity range over an area which covers accounts, vouchers, invoices and documents constituting entries in the books *originate*.⁷⁸

To put it differently it is not enough for the auditors to see whether there are vouchers, apparently formal and regular, justifying each of the items, in respect of which the authority seeks to get credit upon the account put before them for audit. They are not only entitled, but justified and bound to go further than that, and by fair and reasonable examination of the vouchers to see that there are not, amongst the payments so made, payments which are not authorised by the *duty* of the authority, or in any other way illegal or improper. If they discover that any

75. *Allen Craig & Co. (London)* (1934) 1 Ch. 483.

76. *Edgington v. Fitzmaurice* (1885) 29 Ch. 459.

77. *Leeds Estate Building and Investment Co. v. Shephard* (1887) 36 Ch. D. 787 and *Cuff v. London and County etc. Co.* (1912) 1 Ch. 440.

78. Per Eve, J., in *Cuff v. London and County etc. Co.* (1912) 1 Ch. 440 (444).

such improper or illegal payments appear to have been made, it is certainly their duty to make it public by report.⁷⁹ Thus the auditors must report generally on the state of accounts and it is their duty to call attention to that which is wrong.⁸⁰

Though the statutory duty referred to above is not absolute and depends upon the information given and explanation furnished to the auditors, so that there is an abundant scope for discretion, yet that does not exempt them from the duty of examining matters for themselves. The onus lies upon the auditors, who cannot be excused for total omission to comply with any of the requirements of Section 145 or for any consequences of deliberate, reckless, or indifferent failure to ask for information on matters which call for further explanations.⁸¹ Thus an auditor is not justified in omitting to make personal inspection of securities that are in the custody of a person with whom it is not proper that they should be left. Accordingly, when an auditor discovers that the securities of the company are not in proper custody it is his duty to require that the matter be put right at once, or, if his requirement is not complied with, to report the fact to the shareholders, whether he can or cannot make personal inspection.⁸²

In a case of Allahabad High Court,⁸³ an auditor was held liable for the last two years' dividends in having signed a false balance-sheet as auditor by blindly trusting a dishonest manager and secretary of the company. Wallis, J., in the course of his judgment in the case observed :—" Unless auditors are to be held strictly to their legal liability, however honest they may be, the object of legislature in requiring certificate from them is absolutely defeated. I acquit Mr. De of any conscious dishonesty. I am not satisfied that he deliberately left the Board in order to become an Auditor. I believe he is both in the ordinary way and so far as the conduct of the business is concerned, a perfectly honest man. But on the other hand I hold that he was utterly reckless and indifferent in his conduct as an auditor. He was trusted to discharge his duty, having regard to the experience which he had derived from his previous service, and in my opinion, he allowed Kedar Nath (Secretary) to throw dust in his eyes and to deceive him in the most obvious manner. Mr. De says that if he had examined the books and asked for an explanation about the Tata Industrial Bank's liability, he would have discovered in two minutes that the affairs of the bank were in a very critical state and that the depositors and creditors were being defrauded. He never asked a question and he signed a statement in the balance-sheet saying that he had received all the needed information and explanation. These words are put in for the reason that an auditor is not a mere arithmetical machine to check the figures in the book. He should have satisfied himself not only that the accounts were correct, but that the books represented the true state of affairs of the Bank."

79. Per Lord Russell, C. J., in *Thomas v. Devonport Corporation* (1901) 2 Q. B. D. 16 (21).

80. *Newton v. Curmingham Small Arms Co.* (1906) 2 Ch. 378.

81. *City Equitable Fire Insurance Co. in re.* (1925) 1 Ch. 407.

82. *Ibid.*

83. *Union Bank of Allahabad, in re.* 47 All. 669

Likewise in another case of the same High Court,⁸⁴ where auditors passed over illegal payments without asking for explanation, they were held guilty of misfeasance, as they refrained from doing their manifest duty.

Duty to make reasonable and proper investigation—extent of:—Auditors are bound to make all reasonable and proper investigation of the company's accounts and stocks and if they discover something wrong therein, they must call the attention of the company to it.⁸⁵ But as observed by Lopes, L.J., in the above case (at P. 290), "Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud, when there is nothing to arouse their suspicion and when those frauds are perpetrated by tried servants of the company and are undetected for years by directors". Thus auditors are not bound to exercise more than reasonable care and skill in the discharge of their duty. The following observations of Lopes, L. J., in the last mentioned case are worthy of note:—"It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful and cautious auditor would use. What is reasonable skill, care and caution, must depend upon the particular circumstances of each case. An auditor is not bound to be detective or as was said to approach his work with suspicion or with foregone conclusion that there is something wrong. He is a watch dog, but not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful".

Duties of auditors summed up:—The duties of the auditors have been ably summed up by Lindley, L. J.,⁸⁶ as follows:—

"It is no part of auditors' duty to give advice, either to the directors or shareholders as to what they are to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of the company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit and his duty is confined to that but then comes the question, how is he to ascertain that position? The answer is; by examining the books of the company. But he does not discharge his duty by doing this without enquiry and without taking any trouble to see that books themselves shew the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this, his audit would be worse than an idle farce, assuming the books to be so kept as to shew the true position of a company, the auditor has to frame a

84. *L. Hudson v. Official Liquidator*, A. I. R. 1929 All. 826.

85. *Kingston Cotton Mills* (1896) 2. Ch. 288.

86. *London and General in re. Theobald Ex parte* (1835) 2 Ch. 673 (682).

balance sheet shewing that position according to the books and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do shew, but also for the purposes of satisfying himself that they shew the true financial position of the company.....An auditor, however, is not bound to do more than to exercise reasonable care and skill in making enquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly shew the true position of the company's affairs. He does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of an auditor; he must be honest, *i.e.*, he must not certify what he does not believe to be true; and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case, must depend upon the circumstances of that case. Where there is nothing to excite suspicion, very little enquiry will be reasonably sufficient and in practice, I believe, business men select a few cases at haphazard, see that they are right, and assume the others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than the reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required."

LIABILITIES OF AUDITORS.

The company can, while it is a going concern, proceed against its auditors by way of regular suit for any misfeasance or breach of trust or any other breach of duty and can claim damages therefor.

The auditors can be proceeded against during the course of winding up of a company for any misfeasance or breach of trust in relation to the company under Section 235 of the Act, for the term "Officer" also includes, for the purposes of Sections 235, 236 and 237, of the Act, an auditor. A person merely called in to audit the accounts *pro hac vice* is not, however, an officer of the company and is not, therefore, liable for misfeasance under Section 235. For full discussion see "Liabilities of company officers for misfeasance and breach of trust".

The auditors are also liable for prosecution under Sections 236 and 237 of the Act, for falsification of the books of the company or for any offence in relation to the company, discovered during the course of winding up. For detailed discussion reference may be made to the chapter "Criminal Liabilities of the Company Officers."

Again under Section 145 (5) if any auditor's report does not comply with the requirement of Section 145, every auditor who is knowingly and wilfully a party to the default is made liable to a fine not exceeding Rs. 100.

APPENDIX A

Table of Fees Paid to the Registrar (Table B)

	Rs. A. P.
1. For registration of a company whose nominal share capital does not exceed Rs. 20,000, a fee of	40 0 0
2. For registration of a company whose nominal share capital exceeds Rs. 20,000, the above fee of forty rupees, with the following additional fees regulated according to the amount of nominal capital (that is to say)—	
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 20,000 rupees up to 50,000 rupees	20 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees after the first 50,000 rupees up to 1,00,000 rupees	5 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 1,00,000 rupees	1 0 0
3. For registration of any increase of share capital made after the first registration of the company, the same fees per 10,000 rupees or part of 10,000 rupees, as would have been payable if such increased share capital had formed part of the original share capital at the time of registration :	
Provided that no company shall be liable to pay in respect of nominal share capital on registration, or afterwards, any greater amount of fees than 1,000 rupees taking into account, in the case of fees payable on an increase of share capital after registration, the fees paid on registration.	
4. For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.	
5. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the Registrar by a receiver or the statement required to be filed with the Registrar by the Liquidator in a winding up.	+3 0 0
6. For making a record of any fact by this Act authorised or required to be recorded by the Registrar, a fee of	+3 0 0

II—By a company not having a share capital.

1. For registration of a company whose number of members, as stated in the articles of association, does not exceed 20	40 0 0
2. For registration of a company whose number of members, as stated in the articles exceeds 20, but does not exceed 100	100 0 0
3. For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of Rs. 100 with an additional Rs. 5 for every 50 members, or less number than 50 members after the first 100.	
4. For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of	400 0 0
5. For registration of any increase on the number of members made after the registration of the company, the same fees as would have been payable ¹ [in respect of such increase] if such increase had been stated in the articles of association at the time of registration	2.
Provided that no one company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fee paid on the first registration of the Company.	
6. For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act the same fee as is charged for registering a new company.	
7. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar, by a receiver or the statement required to be filed with the Registrar by the Liquidator in a winding up	+3 0 0
8. For making a record of any fact by this Act authorised or required to be recorded by the Registrar, a fee of	+3 0 0

¹. These words were inserted by Notification No. 1-D, dated 3rd November 1917, see *Gazette of India*, 1917, Pt. 1, p. 1787.

². The figure "5" was omitted, *Ibid.*

+ *Vide* Notification No. 23 (11)—Tr. (C. L.) 41 dated 6-6-'42 (*Gazette of India* dated 6-6-'42, Part 1, P 983.)

THE SECOND SCHEDULE

(See Sections 98 and 154).

FORM I

THE INDIAN COMPANIES ACT, 1913 STATEMENT IN LIEU OF PROSPECTUS filed by

.....LIMITED.

Pursuant to Section 98 of the Indian Companies Act, 1913 (VII of 1913).
Presented for filing by

The nominal share capital of the company	Rs.....
Divided into 	Shares of Rs.....each. " Rs .....each. " Rs..... each.
Amount (if any) of above capital which consists of redeemable preference shares.	Shares of Rs each.
The date on or before which these shares are, or are liable, to be redeemed.	
Names, descriptions and addresses of directors or proposed directors and managers or proposed managers, and any provision in the articles or in any contract, as to appointment of and remuneration payable to directors or managers.	
If the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively,	
Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash.	1. ——— shares of Rs..... fully paid. 2. ——— shares upon which Rs..... per share credited as paid. 3. Debenture Rs..... 4. Consideration.
Names and addresses of vendors of property purchased or acquired or proposed to be purchased or acquired by the company.	
Amount (in cash, shares or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill.	Total purchase price ... Rs... Cash ... Rs..... Shares ... Rs..... Debentures ... Rs..... Goodwill ... Rs.....
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company; or	Amount paid. Amount payable.
Rates of the commission.....	Rate per cent.

The number or shares, if any, which persons have agreed for a commission to subscribe absolutely.	
Estimated amount of preliminary expenses.	Rs.....
Amount paid or intended to be paid to any promoter.	Name of promoter..... Amount Rs
Consideration for the payment.	Consideration:—
Dates of, and parties to every material contract (except contracts entered into in the ordinary course of the business intended to be carried on by the company or contracts, other than contracts appointing or fixing the remuneration of a managing director or managing agent, entered into more than two years before the delivery of this statement).	
Time and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the company (if any).	
Full Particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.	
If it is proposed to acquire any business, the amount, as certified by the persons by whom the ¹ [accounts] of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirement shall have effect as if references to two years or one year, as the case may be, were substituted for reference to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.	

(Signatures of the persons above named as Directors or proposed Directors or of their agents authorised in writing).

Date

FORM II

¹ This word was substituted for the word "amounts" by S. 20 of the Indian Companies (Amendment) Act, 1938 (II of 1938).

FORM II
THE INDIAN COMPANIES ACT, 1913 (VII OF 1913)
STATEMENT IN LIEU OF PROSPECTUS
filed by

-----**LIMITED,**

Pursuant to sub-section (1) of Section 154 of the Indian Companies Act, 1913 (VII of 1913).
Presented for filing by

The nominal share capital of the Company.	Rs.															
Divided into	Shares of Rs.....each. Shares of Rs.....each. Shares of Rseach.															
Amount (if any) of above capital which consists of redeemable preference shares.	Shares of Rseach.															
The date on or before which these shares are, or are liable, to be redeemed.																
Names, descriptions and addresses of Directors or proposed Directors and Managers or proposed Managers, and any provision in the Articles, or in any contract, as to appointment of and remuneration payable to Directors or Managers.																
If the share capital of the Company is divided into different classes of shares, the right of voting at meetings of the Company conferred by and the rights in respect of capital and dividends attached to, the several classes of shares respectively.																
Number and amount of shares and debentures issued within the two years preceding the date of this statement as fully or partly paid up otherwise than for cash or agreed to be so issued at the date of this statement.	1. Shares of Rs.....fully paid. 2. Shares upon which Rs..... per share credited as paid. 3. Debenture Rs. 4. Consideration.															
Names and addresses of vendors of property (1) purchased or acquired by the Company within the two years preceding the date of this Statement or (2) agreed or proposed to be purchased or acquired by the Company.																
Amount (in cash, shares or debentures) payable to each separate vendor.																
Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill.	<table style="width: 100%; border: none;"> <tr> <td style="width: 60%;">Total purchase price</td> <td style="width: 10%; text-align: right;">...</td> <td style="width: 30%; text-align: right;">Rs.....</td> </tr> <tr> <td>Cash </td> <td style="text-align: right;">...</td> <td style="text-align: right;">Rs.....</td> </tr> <tr> <td>Shares </td> <td style="text-align: right;">...</td> <td style="text-align: right;">Rs.....</td> </tr> <tr> <td>Debentures </td> <td style="text-align: right;">...</td> <td style="text-align: right;">Rs.....</td> </tr> <tr> <td>Goodwill </td> <td style="text-align: right;">...</td> <td style="text-align: right;">Rs.....</td> </tr> </table>	Total purchase price	...	Rs.....	Cash	Rs.....	Shares	Rs.....	Debentures	Rs.....	Goodwill	Rs.....
Total purchase price	...	Rs.....														
Cash	Rs.....														
Shares	Rs.....														
Debentures	Rs.....														
Goodwill	Rs.....														
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the Company; or rate of the Commission.	Amount paid. Amount payable, Rate per cent.															

APPENDIX

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The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.	
Unless more than two years have elapsed since the date on which the Company was entitled to commence business.—	
Estimated amount of preliminary expenses, ... Amount paid or intended to be paid to any promoter ... Consideration for the payment ...	Rs. Name of promoter. Amount Rs. Consideration.
Dates of, and parties to every material contract (except contracts entered into in the ordinary course of the business intended to be carried on by the Company or contracts, other than contracts appointing or fixing the remuneration of a Managing Director or Managing Agent, entered into more than two years before the delivery of this statement).	
Times and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the Company.	
Full particulars of the nature and extent of the interest of every Director in the promotion of or in the property purchased or acquired by the Company within the two years preceding the date of this statement or proposed to be acquired by the Company or where the interest of such a Director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a Director, or otherwise for services rendered by him or by the firm in connection with the promotion or the formation of the Company.	
If it is proposed to acquire any business, the amount as certified by the persons by whom the accounts of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirements shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.	
(Signature of the persons above named as Directors or proposed Directors or of their agents authorised in writing).	

Dated the

day of

FORM E
AS REQUIRED BY PART II OF THE ACT
(See Section 32.)

Summary of Share Capital and Shares of the Company, Limited, made up to the
day of 19 (being the day of the first ordinary general meeting in 19

Nominal share capital Rs.	divided into*	shares of Rs, shares of Rs.	each. each.
Total number of shares taken up* to the day of 19	which number must agree with the total shown in the list as held by existing members	...	...
Number of shares issued subject to payment wholly in cash	...	...	...
Number of shares issued as fully paid up otherwise than in cash	...	...	...
Number of shares issued as fully paid up to the extent of	per	...	...
share other wise than in cash	...	...	...
¹ There has been called up on each—of shares	...	...	Rs.
There has been called up on each—of shares	...	...	Rs.
There has been called up on each—of shares	...	...	Rs.
² Total amount of calls received, including payments on application	and allotment	...	Rs.
Total amount (if any) agreed to be considered as paid on shares	which have been issued as fully paid up otherwise than in cash	...	Rs.
Total amount (if any) agreed to be considered as paid on shares	which have been issued as partly paid up to the extent of	per	Rs.
share	...	...	...
Total amount of calls unpaid	...	...	Rs.
Total amount (if any) of sums paid by way of commission in respect	of shares or debentures or allowed by way of discount since	...	Rs.
date of last summary	...	...	...
Total amount (if any) paid on ³ shares forfeited	...	...	Rs.
Total amount of shares and stock for which share-warrants are out-	standing	...	Rs.
Total amount of share-warrants issued and surrendered respectively	since date of last summary	...	Rs.
Number of shares or amount of stock comprised in each share-	warrant	...	Rs.
Total amount of debt due from the company in respect of all mort-	gages and charges which are required to be registered with the	Registrar under this Act,	Rs.

*When there are shares of different kinds or amounts (e.g., Preference and Ordinary of Rs. 200 or Rs. 100) state the numbers and nominal values separately,

¹Where various amounts have been called or there are shares of different kinds, state them separately.

²Include what has been received or forfeited as well as on existing shares.

³State the aggregate number of shares forfeited,

1

[illegible]

Names.	Addresses.

†The aggregate number of shares held, and not the distinctive numbers, must be stated and the column must be added up throughout so as to make one total to agree with that stated in the summary to have been taken up.

§The date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee, but the name of the transferee may be inserted in the remarks column immediately opposite the particulars of each transfer.

APPENDIX

Names and addresses of the persons who are the managers of the , Limited,
on the day of 19 .

Names.	Addresses.

Note.— Banking companies must add a list of all their places of business.

I, , do hereby certify that the above list and summary truly and correctly
states the facts as they stood on day of 19 .

(Signature).....

(State whether director, manager or secretary.)

APPENDIX B

Indian Companies Rules, 1941 (As amended up to date)

DEPARTMENT OF COMMERCE NOTIFICATION NO. 23 (12) B. Tr. (C. L.) 37, DATED THE 22ND FEBRUARY 1941: In exercise of the powers conferred by Section 151 of the Indian Companies Act, 1913 (VII of 1913), the Central Government is pleased to make the following Rules, namely :

THE INDIAN COMPANIES RULES, 1941.

1. *Short title, extent, commencement and repeal.*—(1) These Rules may be called the Indian Companies Rules, 1941.

(2) They extend to the whole of British India, including Berar, and every reference therein to British India shall be construed as including a reference to Berar.

(3) They shall come into force on the 1st day of April 1941.

(4) The Indian Companies Rules, 1914, are hereby cancelled :

Provided that the cancellation shall not affect the validity of anything done under or in pursuance of the said Rules, and in particular, shall not be deemed to require the remaking of any instrument in the appropriate form prescribed by these Rules.

2. (1) In these Rules, the " Act " means the Indian Companies Act, 1913 (VII of 1913).

(2) For the purposes of these Rules, the Registrar shall be the sole authority to decide whether an officer of a company is a " responsible Officer of the company " or not.

3. *Verification of copies of contracts under Section 104.*—Copies of contracts required to be filed with the Registrar under Section 104 of the Act shall be verified—

(i) by an affidavit of a responsible officer of the Company that they are true copies, or

(ii) by certification of public officers under Section 76 of the Indian Evidence Act, 1872 (1 of 1872).

4. *Verification of copies under Sections 109, 109-A and 110.*—A copy of an instrument or deed filed with the Registrar for registration under Section 109, Section 109-A or Section 110 of the Act shall be verified :—

(i) where the mortgage or charge comprises solely property situate outside British India, by a certificate under the seal of the Company or under the hand of some person interested therein otherwise than on behalf of the Company, that is a true copy ;

APPENDIX B

- (ii) in other cases, by an affidavit of a responsible officer of the Company that is a true copy or by a certificate of a public officer under Section 76 of the Indian Evidence Act, 1872 (1 of 1872).

5. *Manner of giving notice under Section 153-B.*—The notice required by Section 153-B of the Act to be given by the transferee company shall be given to the dissenting shareholder either personally, or by sending it by registered post to his address registered in the books of the transferor company, or (if he has no address within British India so registered) to the address, if any, within British India, supplied by him to the transferor company for the giving of notice to him.

If the dissenting shareholder has no registered address in British India and has not supplied to the transferor company an address within British India for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

6. *Certification of documents under Section 277 of the Act.*—A copy of a document required to be certified under sub-section (1) of Section 277 of the Act shall—

- (i) in the case of a Company incorporated in a country outside His Majesty's dominions, be
 - (a) duly certified as a true copy by an official of the Government to whose custody the original is committed, the signature or seal of such official being authenticated by any of the British officials mentioned in Section 6 of the Commissioners of Oaths Act, 1889 (52 and 53 Vict., c. 10), or in any Act amending the same, or
 - (b) by a Notary of such country, the certificate of the Notary being authenticated by any of the British officials as aforesaid, or
 - (c) by some officer of the company before a person having authority to administer an oath as provided by Section 3 of the said Oaths Act, the status of the person administering the oath being authenticated by any of the British officials as aforesaid; and
- (ii) in the case of a Company incorporated in any part of His Majesty's dominions, be duly certified as a true copy
 - (a) by an official of the Government to whose custody the original is committed, or
 - (b) by a Notary Public of such place, or
 - (c) on oath by an officer of the Company before a person having authority to administer an oath in such place.

7. *Certification of translation under Section 277 or Section 277-B.*—Translations of documents required to be filed with the Registrar under Section 277 or Section 277-B of the Act shall be certified as correct translations,—

- (i) where such translation is made outside of British India,

- (a) by an official having custody of the original, or
- (b) by a Notary Public of the country or place where the Company is incorporated :

Provided that where the Company is incorporated in a country outside His Majesty's dominions, the signature or seal of the person so certifying shall be authenticated by any of the British officials mentioned in Section 6 of the Commissioners of Oaths Act, 1889 (52 and 53 Vict., c. 10), or in any Act amending the same ;

(ii) where such translation is made in British India—

- (a) by an Advocate, Attorney or Pleader entitled to appear before the High Court, or
- (b) by an affidavit of some person having, in the opinion of the Registrar, a competent knowledge of the language of the original and of English.

8. *Power of Central Government to relax Rules 6 and 7.*—The Central Government may, in any particular case, if it thinks fit and upon such conditions as it may impose, permit copies or translations not certified in accordance with Rules 6 and 7 to be filed with the Registrar.

9. *Time for filing alterations of particulars under Section 277.*—Notice of any alteration which is required by sub-section (1) of Section 277 of the Act to be filed with the Registrar shall be filed within one month of the date on which the notice could in due course of post, and if despatched with due diligence, have been received by the Registrar from the place where the Company is incorporated.

10. *Translations of documents other than those under Section 277.*—If any portion of any document required to be filed under any provision of the Act other than Section 277 is not in the English language, a translation thereof, certified by a responsible officer of the Company to be correct, shall be furnished along with each copy deposited with the Registrar :

Provided that the Registrar may exempt any Company from the operation of this Rule in respect of such documents as he may think fit.

11. *Forms.*—The forms set forth in the Schedule hereto annexed or forms as near thereto as circumstances admit shall be used in all matters to which these forms relate.

12. *Payment of fees.*—All fees payable under the Act shall be paid in cash.

APPENDIX B

THE SCHEDULE

FORM I

Declaration on registration of Company.
THE INDIAN COMPANIES ACT, 1913.

[See Section 24]

Filing Fee Rs. 3.

Name of Company.....

Declaration of compliance with the requirements of the Indian Companies Act, 1913, made pursuant to Section 24(2) on behalf of a Company proposed to be registered as the.....

Presented for filing by.....

I.....of.....

do solemnly and sincerely declare that I am an Advocate*/Attorney/a Pleader entitled to appear before a High Court who is engaged in the formation of the company/a person named in the Articles as a Director/Manager/Secretary of the.....

.....and that all the requirements of the Indian Companies Act, 1913, in respect of matters precedent to the registration of the said Company and incidental thereto have been complied with, save only the payment of the fees and sums payable on registration. And I make this solemn declaration conscientiously believing the same to be true.

NOTE.—The declaration need not be either—

(a) signed before a Magistrate or an Officer competent to administer oaths, or

(b) stamped as an Affidavit,

No. of Company.

Filing Fee Rs. 3.

FORM II

Notice of the situation of the office where a British Register is kept or of any change in, or discontinuance of, any such office.

THE INDIAN COMPANIES ACT, 1913.

[See Section 41.]

Name of Company.....

Presented for filing by.....

To the Registrar of Joint Stock Companies,.....

..... Limited,

hereby gives you notice in accordance with Section 41 of the Indian Companies Act, 1913, and by the authority of* a special resolution of the Company, duly passed on the..... day of...../Clause..... of the Company's Arti-

cles of Association that a branch register is now kept at*/in lieu of...../kept at...../is discontinued.

Signature

Designation

(State whether Director or Manager or Secretary

Dated this.....day of.....19.....

*Strike out the portion which does not apply.

No. of Company.

Filing Fee Rs. 3.

FORM III.

Notice of consolidation, division, sub-division, or conversion into stock of shares, specifying the shares so consolidated, divided, sub-divided, or converted into stock, or of the reconversion into shares of stock, specifying the stock so reconverted or of the cancellation of shares (otherwise than in connection with a reduction of share capital under Section 55 of the Indian Companies Act, 1913.)

THE INDIAN COMPANIES ACT, 1913.

[See Section 50/51]

Name of Company.....

Presented for filing by.....

To the Registrar of Joint Stock Companies,.....

.....Limited,

hereby give you notice in accordance with Section 50/51 of the Indian Companies Act, 1913, that—

* (I) shares of Rs. each (.....
.....) have been consolidated and divided into
shares of Rs. each (of larger amount than the shares
consolidated) (.....) (Sections 50 and 51).

* (II) shares of Rs. each (.....
.....) on which Rs. per share is paid up/
have been sub-divided into shares of
Rs. (of smaller amount than the shares sub-divided)
(.....) on which Rs.
per share is paid up (which must be proportionate to the reduced
nominal value of each share). (Section 50).

* (III) Fully paid shares of Rs. each, number-
ed to have been converted into
stock.

* (IV) Rs. of stock has been reconverted into
fully paid shares of Rs. each, numbered
to (Sections 50 and 51).

* (V) shares of Rs. each, being unissued
capital, have been cancelled, and the amount of the authorised capital
has been correspondingly diminished (Section 50).

Signature

Designation

(State whether Director or Manager or Secretary)

Dated this day of 19.....

No. of Company.

FORM IV.**Notice of increase in share capital.****THE INDIAN COMPANIES ACT, 1913.**

[See Section 53.]

Filing Fee.....Difference between Fee payable on Capital as increased
and Fee already paid.

Name of Company.....
Presented for filing by.....
To the Registrar of Joint Stock Companies,.....
.....Limited,
hereby gives you notice pursuant to Section 53 of the Indian Companies Act, 1913,
that by ¹..... resolution of the Company dated theday of
.....19.....the share capital of the Company has been increased by the
addition thereto of the sum of Rs.beyond the registered capital of
Rs.....

The additional capital is divided as follows :—

Number of Shares.	Class of Share.	Nominal Amount of each Share

The conditions (*e.g.*, voting rights, dividends, etc.) subject to which the new shares have been or are to be issued are as follows :—

(If any of the new shares are preference shares state whether they are redeemable or not).

Signature

Designation

(State whether Director or Manager or Secretary)

Dated the.....day of.....19.....

¹ "Ordinary", "extraordinary" or "special".

APPENDIX B

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No. of Company.

FORM V.

Notice of increase in number of members.
THE INDIAN COMPANIES ACT, 1913.
(See Section 53).

Filing Fee.....Difference between Fee payable on the Number as increased and Fee already paid.

Name of Company.....

Presented for filing by

Notice of increase in the number of members of.....
To the Registrar of Joint Stock Companies,

.....Limited
gives you notice, pursuant to Section 53 of the Indian Companies Act, 1913,
that by.....¹ resolution of the Company dated the.....
day of.....19....., the number of members in the Company has
been increased by the addition thereto of.....members beyond the present
registered number of.....

Signature

Designation

(State whether Director or Manager or Secretary)

Dated the..... day of.....19.....

No. of Company.

Filing Fee Rs. 3

FORM VI.

Notice of situation of registered office or of any change therein.
THE INDIAN COMPANIES ACT, 1913.
[See Section 72].

Name of Company.....

Presented for filing by.....

To the Registrar of Joint Stock Companies,.....

.....Limited,
hereby gives you notice, in accordance with Section 72 of the Indian Com-
panies Act, 1913, that the registered office of the Company is situated at¹
/was removed from.....
to.....
on the.....19.....

Signature

Designation

(State whether Director or Manager or Secretary)

Dated the..... day of.....19.....

N.B.—This notice must be filed with the Registrar within 28 days of incorporation or of the change, as the case may be.

¹ " Ordinary", " extraordinary" or "special".

² Strike out the portion which does not apply.

APPENDIX B

FORM VII.

Statutory Report.

THE INDIAN COMPANIES ACT, 1913.

[See Section 77.]

Filing Fee Rs. 3

Name of Company.....
 Statutory Report of the..... Limited,
 certified and filed pursuant to Section 77 (5).

Date and place of the statutory meeting.....

Presented for filing by.....

The Directors report to the members as follows :—

1. Shares allotted up to.....day of.....last (i.e., a date within 7 days of the report) and cash received up to the aforesaid date were :—

Particulars,	Number of Shares.	Nominal Value of each Share.	Cash Received.
<hr/>			
(a) Allotted subject to payment therefor in Cash.	Preference ¹ Ordinary . Deferred .		
(b) Allotted as fully paid up otherwise than in cash, the consideration for which they have been so allotted being:—	Preference ¹ Ordinary . Deferred .		} Nil
(c) Allotted as partly paid up to the extent of Rs. ... per share, the consideration for which they have been so allotted being :—	Preference ¹ Ordinary . Deferred .		
(d) Allotted at a discount of Rs.....per.....share	Preference ¹ Ordinary . Deferred .		

Total

¹Redeemable Preference Shares are to be specified in all cases.

2. The receipts and payments of the Company up to the aforesaid date are as follows :—

Receipts		Rs.	Payments		Rs.
Shares—			Preliminary Expenses	...	
Preference	Commission on Sale of Shares	...	
Ordinary	Discount on Shares	...	
Deferred	Capital Expenditure—		
Share Deposits	Land	...	
Debentures	Buildings	...	
Loans	Plants	...	
Deposits	Machinery	...	
Other Sources (to be specified)			Dead Stock	...	
			Etc.		
			Other Items (to be specified)		
			Balances—		
			In hand	...	
			At Banks	...	
Total		...	Total		...

3. Preliminary Expenses as estimated in the Prospectus* or Statement in lieu of Prospectus Rs.

Preliminary Expenses incurred up to the aforesaid date :—

Law charges

Printing

Registration

Advertisement

Commission on sale of Shares

Discount on Shares

Other initial Expenses

Total Rs.

*Strike out the portion which does not apply.

APPENDIX B

4. Names, addresses and descriptions of the Directors, Auditors (if any), Managing Agents and Managers (if any) and Secretary of the Company and the changes, if any, which have occurred since the date of the incorporation.

Directors

Name	Address	Description	Particulars of changes, if any

Auditors

Name	Address	Description	Particulars of changes, if any*

Managing Agent and Managers

Name	Address	Description	Particulars of changes, if any*

*These particulars must include dates of changes.

Secretary

Name	Address	Description	Particulars of changes if any*

5. Particulars of any contract the modification of which is to be submitted to the meeting for its approval together with the particulars of the modification or proposed modification.

6. The extent to which under-writing contract, if any, have been carried out.

7. The arrears, if any, due on calls from Directors, Managing Agents and Managers.

8. The particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares to any Director, Managing Agent or, Manager or if the Managing Agent is a firm, to any partner thereof, or, if the Managing Agent is a private company, to any Director thereof.

Dated this.....day of.....19.....

We hereby certify this report.*

(Alternatively)

I hereby certify this report.

Two or more Directors.
Chairman of the Directors.
(If authorised by the Board of Directors).

We hereby certify that so much of the report as relates to the shares allotted by the Company and to the cash received in respect of such shares and to the receipts and payments of the Company is correct,

Auditors.

Dated this.....day of.....19.....

NOTES.—1. Receipts and payments account given in para (2) of the Statutory Report with reference to Section 77 (3) (c) of the Indian Companies Act should be prepared up to a date within 7 days of the date of the report and the figures and particulars required under all the other items of the Statutory Report should also be given as on the same date, i.e., the date upto which the receipts and payments account is prepared.

2. This form should contain the actual signatures of the persons who have signed the report, viz., the Directors or the Chairman and the Auditor,

*These particulars must include dates of changes.

*To be certified by not less than two Directors or if the Company has less than two Directors by the sole Director, and forwarded at least twentyone days before the statutory meeting to every member and debenture holder of the Company and to be filed with the Registrar forthwith after it is forwarded, vide Section 77, sub-sections (2), (3) and (5), and Section 146.

APPENDIX B

FORM VIII

Special Resolution/Extraordinary Resolution*

of the

.....Company, Limited

THE INDIAN COMPANIES ACT, 1913.

[See Section 82 (1)]

Filing Fee Rs. 3.

Date of despatch of notice specifying the intention
to propose the resolution as Special
Resolution/Extraordinary Resolution.* }

Passed....., 19.....

Name of Company.....

Presented for filing by.....

To the Registrar of Joint Stock Companies,.....

At a general meeting of the members of the said Company, duly convened
and held at.....in the town of.....
on the.....day of....., 19....., the following special resolu-
tion/extraordinary resolution was duly passed.

Resolved.....that.....

.....
.....
.....

Signature.....

Designation.....

(State whether Director, Manager, Secretary or other
Officer of the Company.)

Dated this.....day of....., 19.....

NOTE.—To be printed or typewritten and duly certified under the signature of an officer of
the Company and filed with the Registrar within 15 days from the passing of the resolution.

*Strike out the portion which does not apply. A separate notice is to be given for a special
resolution and for an extraordinary resolution.

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FORM IX**Consent of Director to act.****THE INDIAN COMPANIES ACT, 1913.****[See Section 84.]****Filing fee Rs. 3.**

Name of Company.....

Consent to act as Director/Directors of the.....
to be signed and filed pursuant to Section 84 (1) (i)---Presented for filing by.....
To the Registrar of Joint Stock Companies,.....I/We, the undersigned, hereby testify my/our consent to act as Director/
Directors of the.....
pursuant to Section 84 (1) (i) of the Indian Companies Act, 1913.

Signature	Address	Description

Dated this.....day of.....19.....

FORM X**List of persons consenting to be Directors.****THE INDIAN COMPANIES ACT, 1913.****[See Section 84.]****Filing fee Rs. 3.**

Name of Company.....

List of the persons who have consented to be Directors of the.....
to be filed with the Registrar pursuant to Section 84 (2).Presented for filing by.....
To the Registrar of Joint Stock Companies,.....**NOTES.—(1) If a Director signs by "his agent authorised in writing", the authority must be produced and a copy attached.****(2) Section 84 (3) of the Indian Companies Act, 1913, provides that—****" This Section shall not apply to a private company or a company which was a private company before becoming a public company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business."**

I/We, the undersigned, hereby give you notice, pursuant to Section 84 (2) of the Indian Companies Act, 1913, that the following persons have consented to be Directors of the.....

Name	Address	Description

Signature, address and description of applicant for registration.

Dated this.....day of.....19.....

NOTE.—Section 84 (3) of the Indian Companies Act, 1913, provides that—

"This Section shall not apply to a private company or a company which was a private company before becoming a public company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business".

FORM XI

Agreements to take qualification shares in proposed Company.

THE INDIAN COMPANIES ACT, 1913.

(See Section 84.)

Filing Fee Rs. 3.

Contract by Directors to take and pay for qualification shares in.....

.....Limited to be signed and filed pursuant to Section 84 (1) (i) of the Indian Companies Act, 1913.

Presented for filing by.....

We, the undersigned, having consented to act as Directors of the..... Limited, do each hereby agree to take from the said company and pay for the.....shares of.....each, being the number of shares prescribed as the qualification for the office of Director of the said Company.

Signature	Address	Description

Dated.....

Witness to the above signatures.....

Address.....

FORM XII

Particulars of Directors, Managers and Managing Agents and of any changes therein.

THE INDIAN COMPANIES ACT, 1913.

[See Section 87.]

Filing Fee Rs. 3.

Name of Company.....

Presented for filing by.....

The present Christian Name or names and surname (a) (d)	Any former Christian name or names or surname	Nationality	Nationality of origin (if other than the present Nationality)	Usual residential address	Other business occupation and Directorships if any; if none state so (b)	Date of appointment or change	Changes (c)

Signature

Designation

(State whether Director, Manager or Managing Agent(s).)

Dated the..... day of.....19.....

- (a) In the case of a corporation its corporate name and registered or principal office should be shown
- (b) The individual's primary business, occupation and particulars of all other directorships held by him must be entered.
- (c) Particulars of change among Directors, Managers or Managing Directors should be sent to the Registrar. A note of the changes since the last list should be made in this column, e.g.- by placing against a new Director's name the words "in place of.....," and by writing against any former Director's name change caused by death/resignation/retirement/removal/rotation/disqualification.
- (d) In the case of a firm, the full name, address and nationality of each partner and the date on which each became a partner,

FORM XIII

**Declaration before commencing business in case of Company issuing a
Prospectus.**

THE INDIAN COMPANIES ACT, 1913.

(See Section 103).

Filing Fee Rs. 3.

Name of Company.....

Declaration that the conditions of Section 103 of the Act have been complied with.

Presented for filing by.....

I.....of.....

being the Secretary/a Director of the.....do solemnly and
sincerely declare :

That the amount of the share capital of the Company offered to the public
for subscription is Rs.....

That the amount stated in the Prospectus as the minimum amount which, in
the opinion of the Directors, must be raised by the issue of share capital in order to
provide for the matter specified in sub-section (2) of Section 101 of the Indian
Companies Act, 1913, is Rs.....

That shares held subject to the payment of the whole amount thereof in
cash have been allotted to the amount of Rs.....

That every Director of the Company has paid to the Company on each of
the shares taken or contracted to be taken by him, and for which he is liable to pay
in cash, a proportion equal to the proportion payable on application and allotment
on the shares offered for public subscription.

I declare that the foregoing statements are true to my knowledge and
belief.

Signature.....

Date.....

NOTES.—(1) The declaration need not be—

- (a) signed before a Magistrate or an officer competent to administer oaths; or
- (b) stamped as an affidavit.

(2) Section 103 (6) of the Indian Companies Act, 1913, provides that—

“ Nothing in this Section shall apply to a private company, or to a company registered
before the commencement of this Act which does not issue a prospectus inviting the
public to subscribe for its shares or, in so far as its provisions relate to shares, to a
company limited by guarantee and not having a share capital.”

(3) For further restrictions on commencement of business by Banking Companies, *vide*
Section 277-I of the Indian Companies Act.

FORM XIV.

**Declaration before commencing business in case of Company filing
Statement in lieu of Prospectus.**

THE INDIAN COMPANIES ACT, 1913.

[See Section 103.]

Filing fee Rs. 3.

Name of Company.....

Declaration that the conditions of Section 103 of the Act have been complied with.

Presented for filing by.....

I.....of.....being the *Secretary/a Director
of.....do solemnly and sincerely declare :

That the amount of the share capital of the Company subject to the payment of the whole amount thereof in cash is Rs.

* That the Company being one which does not issue a Prospectus inviting the public to subscribe for its shares, there has been filed with the Registrar a Statement in lieu of Prospectus.

That the amount fixed by the Memorandum or Articles and named in the Statement as the minimum subscription upon which the Directors may proceed to allotment is Rs.....

That shares held subject to the payment of the whole amount thereof in cash have been allotted to the amount of Rs.....

That every Director of the Company has paid to the Company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares payable in cash.

I declare that the foregoing statements are true to my knowledge and belief.

Signature.....

Dated this.....day of.....19

NOTES. — (1) The declaration need not be—

- (a) signed before a Magistrate or an officer competent to administer oaths ;
- (b) stamped as an affidavit.

- (2) For further restrictions on commencement of business by Banking Companies, *vide* Section 277-1 of the Indian Companies Act.

+ Strike out the portion which does not apply.

APPENDIX B

FORM XY.

Return of Allotments.

THE INDIAN COMPANIES ACT, 1913.

[See Section 104.]

Filing Fee (See Note 2.)

Name of Company.....

Return of allotments of the
 made on the following date/dates*.....filed with the Registrar
 pursuant to Section 104 (1).

Presented for filing by.....

1. **Shares allotted payable in cash.

No.	Nominal Amount.	Due and Payable— Called Up <i>per Share</i> (in- cluding Application and Allotment).	Paid Up (excluding Pre- miums on Shares and Calls in Advance).	
			Per Share.	Total.
1	2	3	4	5

2. **Shares allotted for a consideration other than Cash :—

Number.....

Nominal Amount Rs.....

Amount to be treated as paid up on each share Rs.....

The consideration for which such shares have been allotted is as follows :—

 Property and Assets acquired Rs.....
 (Description)

Goodwill of Rs.....

Services (give nature of services) Rs.....

Other Items (to be specified) Rs.....

* Insert date or dates of the allotments.

3. † Number of shares issued at a discount (*Vide* Section 105-A).....

Nominal amount of the shares so issued.....

Amount of discount per share.....;

Paid up per share

Names, addresses and description of the allottees.

Date of Allotment.	Name in full.	Address.	Description.	Number of shares allotted.		
				Preference.	Ordinary.	Other kinds.

Dated thisday of19.....

Signature

Designation

(State whether Director, Manager,
Managing Agent or Secretary).

NOTE 1.—In making a return of allotments under Section 104 (1) of the Indian Companies Act, 1913, it is to be noted that :—

When a return includes several allotments made on different dates, the actual dates of all such allotments should be entered at the top of the front page, and the registration of the return should be effected within the month of the first date.

NOTE 2.—The filing fee is payable according to the following Scale—*Vide* Government of India, Department of Commerce Notification No. 426-T (2), dated the 11th September 1926:—

	Rs. A. P.
Where the paid-up value of the shares allotted does not exceed Rs. 25	... 0 4 0
Where the paid-up value of the shares allotted exceeds Rs. 25, but does not exceed Rs. 50	... 0 8 0
Where the paid-up value of the shares allotted exceeds Rs. 50, but does not exceed Rs. 75	... 0 12 0
Where the paid-up value of the shares allotted exceeds Rs. 75, but does not exceed Rs. 100	... 1 0 0
Where the paid-up value of the shares allotted exceeds Rs. 100	... 3 0 0

† Distinguish between preference, ordinary, or other description of shares, specifying Redeemable Preference Shares, if any, in all cases.

APPENDIX B

FORM XVI

Particulars of Oral Contracts.

THE INDIAN COMPANIES ACT, 1913.

[Pursuant to Section 104 (2).]

Filing Fee Rs. 3.

Name of Company.....

The particulars must be stamped with the same stamp duty as would have been payable if the contract had been reduced to writing.

Presented for filing by.....

Particulars of contract relating to shares allotted as fully or partly paid up otherwise than in cash by..... Limited.

(1) The number of shares allotted as fully or partly paid up otherwise than in cash.

(2) The nominal amount of each share Rs.

(3) The amount to be considered as paid up on each such share otherwise than in cash Rs.

(4) If the consideration for the allotments of such shares is services, or any consideration other than that mentioned below in part 5, state the nature of such consideration and the number of shares so allotted.	No. of shares..... Details of consideration.....
--	---

(5) If the allotment is made in satisfaction or part satisfaction of the purchase price of property, give a brief description of such property, and full particulars of the manner in which the purchase price is to be satisfied.

(1) Brief description of property.

(2) Purchase Price ... Rs.

(i) Total amount considered as paid on.....
shares allotted otherwise than in cash ... Rs.

(ii) Debentures issued ... Rs.

(iii) Cash ... Rs.

(iv) Amount of debt released or liabilities assumed
by the purchaser (including mortgages on
property acquired) ... Rs.

Total purchase price ... Rs.

- (6) Give full particulars, in the form of the following table, of the property which is the subject of the sale, showing in detail how the total purchase price is apportioned between the respective heads :

	Rs.	A.	P.
Legal Estates in Freehold Property and Fixed Plant and Machinery and other fixtures thereon	...		
Legal Estates in Leasehold Property	...		
Fixed Plant and Machinery on Leasehold Property (including Tenants, Trade and other Fixtures)	...		
Equitable Interests in Freehold or Leasehold Property*	...		
Loose Plant and Machinery, Stock-in-Trade, and other Chattels †	...		
Goodwill and Benefit of Contracts	...		
Patents, Designs, Trade Marks, Licences, Copyrights, etc.	...		
Book and other Debts	...		
Cash in Hand and at Bank on Current Account, Bills, Notes, etc.	...		
Cash on Deposit at Bank or elsewhere	...		
Shares, Debentures and other investments	...		
Other Items (to be specified)	...		
	Rs.		

Signature
Designation

(State whether Director or Manager or Secretary).

Dated the..... day of.....19

FORM XVII.

Statement as to Commission where Shares not offered to the Public.

THE INDIAN COMPANIES ACT, 1913.

[See Section 105.]

Filing fee Rs. 3.

Name of Company

Presented for filing by

Statement of the amount or rate per cent. of the commission payable in respect of shares and of the number of shares which persons have agreed for a commission to subscribe absolutely, or conditionally.

Name of Company	Article No.
Articles of Association authorising commission.....	
Particulars of the amount paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure, subscriptions for any shares in the Company, or	Paid Rs.
Rate of such commission.....	Payable Rs.
Date of circular or notice (if any), not being a Prospectus, inviting subscriptions for the shares and disclosing the amount or rate of the commission	Rate per cent.
Number of shares which persons have agreed for a commission to subscribe absolutely	Date.
Number of shares which persons have agreed for a commission to subscribe conditionally	No.
	No.

Signature of all the Directors or of their agents authorised in writing.

Dated thisday of.....19 .

* Where such properties are sold subject to mortgage, the gross value should be shown.

† No plant and machinery which was not in an actual state of severance on the date of the Sale should be included under this head.

APPENDIX B

FORM XVIII

Particulars of Mortgages or Charges

THE INDIAN COMPANIES ACT, 1913

[See Sections 109 and 277-D.]

Filing fee Rs. 3.

Name of Company.....

Particulars to be filed with the Registrar pursuant to Section 109 of a mortgage or charge created by the.....and being:

- (a) A mortgage or charge for the purpose of securing any issue of debentures; or
- (b) A mortgage or charge on uncalled share capital of the Company; or
- (c) A mortgage or charge on any immovable property wherever situate, or any interest therein; or
- (d) A mortgage or charge on any book debts of the Company; or
- (e) A mortgage or a charge, not being a pledge on any movable property of the Company except stock-in-trade; or
- (f) A floating charge on the undertaking or property of the Company (Strike out the sub-heads (a), (b), (c), (d), (e) or (f) which do not apply).

Presented for filing by.....

Particulars of mortgage or charge created by the

 (1) Date of the instrument creating or evidencing the mortgage or charge and description thereof⁺

 (2) Amount secured by the mortgage⁺⁺

 (3) Short particulars of the property mortgaged or charged.

 (4) Gist of the terms or conditions or extent or operation relating to any mortgage or charge.

 (5) Names (with addresses and descriptions) of the mortgages or persons entitled to the charge.

 (6) Amount or rate per cent. of the commission, allowance or discount (if any).

Signature.....

Designation.....

[State whether Director, Manager or Secretary or Person authorised to accept service of process under Section 277 (1) (d).]

Dated this.....day of.....19

⁺ A description of the instrument, e.g., "Trust Deed," "Mortgage," "Debenture," etc., as the case may be, should be given.

⁺⁺ A definite figure is to be given.

FORM XIX.

Particulars of Modification of Mortgage or Charge

THE INDIAN COMPANIES ACT, 1913.

[See Sections 116 (3) and 277-D.]

Filing Fee Rs. 3.

Name of Company.....

Presented for filing by.....

Particulars. 1	According to original Instrument, 2	According to Modifying Instrument †. 3
<hr/>		
1. Date and description of Instrument,		
2. Amount secured by the mortgage or charge.		
3. Brief particulars of property mortgaged.		
4. Gist of terms or conditions, or extent or operation of the mortgage or charge.		

Signature.....

Designation.....

[State whether Director, Manager or Secretary or person authorised to accept service of process under Section 277 (1) (d).]

Dated.....

NOTE.—Section 116 (3) of the Indian Companies Act, 1913, provides that:—

Whenever the terms or conditions or extent or operation of any mortgage or charge registered under this Section are modified, it shall be the duty of the Company to send to the Registrar the particulars of such modification, and the provisions of this Section as to registration of a mortgage or charge shall apply to such modification of the mortgage or charge as aforesaid.

† In this column, particulars have to be given only when there is a variation from column

APPENDIX B

FORM XX.

Particulars of a Mortgage or Charge subject to which property has been acquired on or after the 15th January, 1937.

THE INDIAN COMPANIES ACT, 1913,

[See Sections 109-A and 277-D.]

Filing fee Rs. 3.

Name of Company.....

Presented by.....

* Particulars of a mortgage or charge subject to which property has been acquired on or after the 15th January 1937 by.....

.....a company registered in British India/a company incorporated outside and having a place of business in British India.*

(1) Date and description of the instrument creating or evidencing the mortgage or charge **

(2) Date of the acquisition of the property.

(3) Amount owing on security of the mortgage or charge

(4) Short particulars of the property mortgaged or charged.

(5) Gist of the terms or conditions or extent or operation relating to any mortgage or charge.

(6) Names, addresses and descriptions of the mortgagees or persons entitled to the charge.

(In the case of a company incorporated in British India)—

Signature.....

Designation.....

(State whether Director, Manager or Secretary)

Dated this.....day of.....19

(In the case of a company established outside British India)—

Signature of any one or more of the persons.....
authorised under Section 277 (1) (d) of the.....
Indian Companies Act, 1913, or of some.....
other person authorised by the Company.

Dated this.....day of.....19

NOTE.—A copy of the instrument, certified as prescribed in Rule 4 of the Indian Companies Rules, 1941, must be delivered with these particulars,

* Strike off the portion which does not apply.

** A description of the instrument, e.g., "Trust Deed," "Mortgage," "Debenture," etc., as the case may be, should be given.

FORM

Form of Register of mort
THE INDIAN COM

(See Sections 109,

Register of Mortgages and charges and of

[illegible]

APPENDIX B

FORM XXII.

Registration of Series Debentures.

THE INDIAN COMPANIES ACT, 1913.

[See Sections 110 and 277-D.]

Filing fee Rs. 3.

Name of Company.....

Particulars to be filed with the Registrar pursuant to Section 110 relating to a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of the said series are entitled *pari passu* created by the.....

Presented for filing by.....

(1) Total amount secured by the whole series

(2) Amount of the present issue of the series.

(3) Dates of resolutions authorising the issue of the series .

(4) Dates of the covering deed (if any) by which the security is created or defined; or if there is no such deed, the date of the first execution of any debenture of the series *

(5) General description of the property charged .

(6) Gist of the terms or conditions or extent or operation relating to any mortgage or charge .

(7) Names and addresses of the trustees (if any) for the debenture holders .

(8) Amount or rate per cent. of the commission, allowance or discount (if any)

Signature.....

Designation.....

[State whether Director, Manager or Secretary or person authorised to accept service of process under Section 277 (1)(a).]

Dated this.....day of.....19....

NOTE.—The deed, if any, or a copy thereof verified in accordance with Rule 4 of the Indian Companies Rules, 1941, containing the charge must be filed with these particulars with the Registrar within twenty-one days after the execution of such deed or, if there is no such deed, one of the debentures must be so delivered within twenty-one days after the execution of any debentures of the series.

* A description of the instrument, e.g., "Trust Deed," "Mortgage," "Debenture," etc. as the case may be, should be given.

FORM XXIII

Registration when more than one issue of the same series.

THE INDIAN COMPANIES ACT, 1913.

[See Sections 110 and 277-D]

Filing Fee Rs. 3.

Name of Company

Statement of particulars as required by Section 110 when more than one issue is made of debentures in a series.

Presented for filing by

Particulars of an issue of debentures made by

To be entered on the register pursuant to the proviso to Section 110 of the Indian Companies Act, 1913.

(1) Date of present issue

(2) Amount of present issue

(3) Gist of the terms or conditions or extent or operation relating to any mortgage or charge.

(4) Particulars as to the amount or rate per cent. of the commission, allowance, or discount (if any) *

(5) Total amount covered by the whole series

(6) Total amount of issue, including the present issue.

Signature

Designation

[State whether Director, Manager or Secretary or person authorised to accept service of process under Section 277 (1) (d).]

Dated this day of, 19.....

NOTE.—Section 110 of the Indian Companies Act, 1913, and the proviso thereunder provide :—

- (1) For registration of particulars of the entire series (for which purpose Form No. XXII must be used), and
- (2) When there is more than one issue of debentures of the series, for registration of the amount and date of each issue after the first (for which purpose this Form No. XXIII must be used),

* The rate of interest payable under the terms of the Debentures should not be altered.

FORM XXIV.
Chronological Index of Charges entered in the Register.
THE INDIAN COMPANIES ACT, 1913.

(See Section 113.)

Serial number of charge in this Index.	Date of Registration	Name of Company.	Number of Company.	Amount of mortgage or charge.	Date of trust or deed.	Debentures.		Other mort- gages, etc.	By whom registered.	Names and addresses of mortgages or trustees for debenture- holders or other persons entitled to the charge.	Remarks.
						First issue.	Further issue.				
1	2	3	4	5	6	7	8	9	10	11	12
				Rs.							

FORM XXV.

Notice of Appointment of a Receiver.
THE INDIAN COMPANIES ACT, 1913.

(See Section 118).

Filing Fee Rs. 3.

Notice pursuant to Section 118 as to the appointment of a Receiver.

The.....Company.....

Presented for filing by.....

To the Registrar of Joint Stock Companies,.....

I,.....of hereby give notice that:—

* (1) I have obtained an order of the..... dated.....
 for the appointment of Mr.....of.....as
 Receiver of the property of this Company.

* (2) On the..... day of.....I appointed
 Mr. of as Receiver of the
 property of this Company under the powers contained in an instrument ‡
 dated.....

Signature.....

Dated this.....day of.....19.....

NOTE.—This notice must be filed within 15 days of the order or of the appointment under the instrument. The penalty for default is a fine not exceeding Rs. 50 for every day during which the default continues.

FORM XXVI.

Abstract of Receiver's Accounts.
THE INDIAN COMPANIES ACT, 1913.

[See Section 119.]

(No filing fee payable.)

Name of Company.....

Presented for filing by.....

Name and address of Receiver.....

Date and description of instrument under {
 which Receiver is appointed.

* Of these two paragraphs strike out that which does not apply.

† Insert name of Court making the order.

‡ Describe fully the instrument under which appointment is made.

FORM XXVIII

Memorandum of Satisfaction of Mortgage or Charge.

THE INDIAN COMPANIES ACT, 1913.

(See Sections 121 and 227-D.)

Filing fee Rs. 3.

Name of Company.....

Presented for filing by.....

The.....(name of Company) hereby gives notice that the registered charge, being mortgage/charge/hypothecation/debenture/series of debentures, authorised by resolution, dated the.....for Rs.....of which particulars were registered with the Registrar of Companies on the.....day of.....19....., was satisfied on the.....day of19.....

2. The name(s) and address(es) of the mortgage(s)/trustee(s) for the debenture-holders are.....

(In the case of a Company incor- }
porated in British India.) }

Signature.....

Designation.....

(State whether Director, Manager or Secretary.)

Dated this.....day of..... 19.....

(In the case of a Company established outside British India.)

Signature of any one or more of the persons }
authorised under Section 277 (1) (d) of the }
Indian Companies Act, 1913, or of some }
other person authorised by the Company. }

Dated this.....day of.....19.....

APPENDIX B

FORM XXIX

Notice to Dissenting Shareholders.

THE INDIAN COMPANIES ACT, 1913.

(See Section 153-B.)

re ¹..... Limited.Notice by ²..... Limited.To ³.....

Whereas on the.....day of....., 19....², made an offer to all the holders of ⁴.....shares in ¹ (state shortly the nature of the offer)

and whereas up to the.....day of.....19..... being a date within four months of the date of making thereof such offer was approved by the holders of not less than three-fourths in value of the ⁴..... shares in the said company. Now, therefore, the said ²..... in pursuance of the provision of Section 153-B of the Indian Companies Act, 1913, hereby gives you notice that if the said ²..... desires to acquire the ⁴..... shares in the said ¹..... held by you

And further take notice that unless upon an application made to the Court by you the said ²..... on or before the.....day of.....19..... being one month from the date of this notice the Court thinks fit to order otherwise, the said ²..... will be entitled and bound to acquire the ⁴..... shares held by you in the said ¹..... on the terms of the above mentioned, offer approved by the approving ⁴..... shareholders to said Company.

(Signature for ².....)

Designation.....

(State whether Director or Manager or Secretary.)

Dated the.....day of....., 19....

¹ Name of the transferor company.² Name of the transferee company.³ Name and address of dissenting shareholder.⁴ If the offer is limited to a certain class or classes of shareholders insert particulars to the shares.

No. of Company.

Filing fee Rs. 3.

FORM XXX

**Application by an existing Company for registration as a
Limited Company.**

THE INDIAN COMPANIES ACT, 1913.

[See Sections 253, 255, 256 and 257.]

Name of Company.....

Presented for filing by.....

Application by.....Company, for registration as a
Limited Company under the Indian Companies Act, 1913.

.....Company, constituted by.....dated the
.....day of.....desired to register itself as a Company limited
by.....shares/guarantee under the Indian Companies Act, 1913, by the
name of.....Company, Limited, and for that purpose,
delivers the undermentioned documents for registration under the said Act.

Signature.....

Designation.....

(State whether Director or Manager or Secretary.)

Dated this.....day of.....19

** Documents delivered for Registration with the foregoing application.*

1. Copy of the.....constituting or regulating the Company.
2. List of the members of the Company made up to the.....day of
.....19.....
3. Statement showing the nominal capital of the Company, etc.
4. List of the Directors or other Managers of the Company.
5. Copy of resolution of the Company assenting to its registration as a
Limited Company, and adding the word " Limited " to its name.
6. Declaration by †.....of the Company, verifying the particulars
set forth in the documents above mentioned.

* Documents 1, 2, 3, 5 and 6 are to be filed by an existing Joint Stock Company, while documents 1, 3, 4, 5 and 6 are to be filed by a Company other than a Joint Stock Company.

† This Declaration to be by any two Directors or other principal officers of the Company.

No. of Company.

No filing fee, vide Section 260.

FORM XXXI

**Application by an existing Company for registration as an
Unlimited Company.**

THE INDIAN COMPANIES ACT, 1913.

[See Sections 253, 255, 256 and 257.]

Name of Company.....

**To be used in the case of existing Companies desiring to be registered
without limited liability.**

Presented for filing by.....

**Application by.....Company.....for registration
as an Unlimited Company under the Indian Companies Act, 1913.**

**.....Company, constituted by.....dated the
.....day of.....desired to register itself under the Indian
Companies Act, 1913, and for that purpose delivers the undermentioned documents
for registration under the said Act.**

Signature.....

Designation.....

(State whether Director or Manager or Secretary.)

Dated this.....day of.....19....

Documents delivered for Registration with the foregoing application.

- 1. Copy of the.....constituting or regulating the Company.**
- 2. List of the members of the Company made up to the.....day of
.....**
- 3. Statement of the registered office of the Company.**
- 4. List of the Directors or other Managers of the Company.**
- 5. Copy of resolution of the Company assenting to its Registration.**
- 6. Declaration byof the Company verifying the parti-
culars set forth in the documents above-mentioned.**

*** This declaration is to be by any two Directors or other principal officers of the Company.**

No. of Company.

Filing fee Rs. 3.

FORM XXXII**Registration of an existing Company as a Limited Company.***Copy of Resolutions assenting to Registration with Limited Liability.***THE INDIAN COMPANIES ACT, 1913.****[See Sections 253, 255 and 256.]**

Name of Company.....

Presented for filing by.....

Copy of the resolutions passed at a general meeting of.....
 Company.....held on the.....day of.....19.....
 assenting to its being registered with limited liability.

(The resolutions to be written or printed here.)

Signature.....

Designation.....

(State whether Director or Manager
or Secretary.)

No. of Company.

Filing fee Rs. 3.

FORM XXXIII**Registration of an existing Company.***List of Members.***THE INDIAN COMPANIES ACT, 1913.****[See Section 255.]**

Name of Company.....

Presented for filing by.....

FORM XXXIV

Registration of an existing Company as a Limited Company.

Statement of Nominal Capital, its division into Shares, the number of Shares taken and amount paid thereon, or the amount of Stock of which it consists, also of the name and Registered Office of the Company.

THE INDIAN COMPANIES ACT, 1913.

[See Sections 255 and 256.]

Filing Fee Rs. 3.

Name of Company.....

Presented for filing by.....

Amount of nominal capital.....

Number of shares into which it is divided, and amount
of each share.

Number of shares taken up to the.....day of
....., 19.....*

Amount paid on each share.....

Amount of stock of which it consists.....

Name of the Company..... Limited.

Registered office.....

If the Company is intended
to be registered as Com-
pany Limited by guaran-
tee..... The
Resolution declaring the
amount of the guarantee.

Resolved that each member undertakes to
contribute to the assets of the Company
in the event of its being wound up while
he is a member, or within one year after-
wards, for payment of the debts and
liabilities of the Company contracted before
he ceased to be a member, and of the costs
and expenses of winding up, and for the
adjustment of the rights of the contribu-
tories among themselves such amount as
may be required not exceeding Rs.....

Signature.....

Designation.....

(State whether Director or Manager or Secretary.)

Dated the.....day of.....19

* Not more than six clear days before delivery for registration,

No. of Company.

Filing fee Rs. 3.

FORM XXXV**Registration of an existing Company.**

*Declaration verifying Documents delivered to the Registrar of Companies with
Application for Registration.*

THE INDIAN COMPANIES ACT, 1913.

[See Section 257.]

Name of Company.....

Presented for filing by.....

We,.....of.....and.....of
.....being two.....of the.....
of.....Company.....do solemnly and sincerely
declare that the particulars set forth in the several documents accompanying
this declaration, and marked respectively with the letters.....are
true; and we make this solemn declaration conscientiously believing the same
to be true.

Directors/Principal Officers.

NOTES.—1. The declaration should be signed by two or more Directors or other principal
officers.

2. No affidavit is required in respect of this form.

FORM XXXVI

**Documents (Charter, Statutes, or Memorandum and Articles of the Company, or
other Instrument) constituting or defining the constitution
of the Company.**

THE INDIAN COMPANIES ACT, 1913.

(See Section 277.)

Filing Fee Rs. 5.

Name of Company.....

Presented for filing by.....

The.....(name of Company) incorporated in.....
country of origin), having a place of business in British India at.....
in the Province of.....

Presents for filing, pursuant to Section 227 (1) (a) of the Indian Companies Act, 1913, the following .—

1. *Charter/Statutes/Memorandum and Articles of Association/.....
.....(other instrument to be specified), constituting or defining the constitution of the Company, and duly certified as required by the Indian Companies Rules, 1941.**

2. (If the aforesaid document is not written in the English language), a translation thereof, duly certified as required by the Indian Companies Rules, 1941.**

Signature or Signatures of any one or more
of the persons authorised under Section 277 (1)
(d) of the Indian Companies Act, 1913, or of
some other person in British India duly autho-
rised by the Company.

Dated this.....day of.....19

N. B.—This Form, accompanied by the certified documents and by the Forms XXXVII, XXXVIII, XXXIX, and XLII must be filed within one month from the establishment of a place of business in the Province in British India.

6. *Certification of documents under Section 277 of the Act.*—A copy of a document required to be certified under sub-section (1) of Section 277 of the Act shall

(i) in the case of a Company incorporated in a country outside His Majesty's dominions be

(a) duly certified as a true copy by an official of the Government to whose custody the original is committed, the signature or seal of such official being authenticated by any of the British officials mentioned in Section 6 of the Commissioners of Oaths Act, 1889 (52 and 53 Vict., c. 10), or in any Act amending the same, or

* Particulars of the documents required to be filed under Section 277 (1) of the Indian Companies Act, 1913 :—

- (a) A certified copy of the Charter, Statutes or Memorandum and Articles of the Company or other instrument constituting or defining the constitution of the Company, and if the instrument is not written in the English language, a certified translation thereof;
- (b) The full address of the registered or principal office of the Company. (see Form XXXVII);
- (c) A list of the Directors and Managers (if any) of the Company (see Form XXXVIII);
- (d) The names and addresses of some one or more persons resident in British India authorised to accept on behalf of the Company service of process and any notices required to be served on the Company.

** Certification of documents under Section 277 of the Act.

- (b) by a Notary of such country, the certificate of the Notary being authenticated by any of the British officials as aforesaid, or
 - (c) by some officer of the Company before a person having authority to administer an oath as provided by Section 8 of the said Oaths Act, the status of the person administering the oath being authenticated by any of the British officials as aforesaid ; and
- (ii) in the case of a Company incorporated in any part of His Majesty's dominions,
- (a) be duly certified as a true copy by an official of the Government to whose custody the original is committed, or
 - (b) by a Notary Public of such place, or
 - (c) on oath by an officer of the Company before a person having authority to administer an oath in such place.

7. *Certification of translations under Section 277 or Section 277-B.*—Translations of documents required to be filed with the Registrar under Section 277 or Section 277-B of the Act shall be certified as correct translations,—

- (i) where such translation is made outside of British India,
 - (a) by an official having custody of the original, or
 - (b) by a Notary Public of the country or place where the Company is incorporated:

Provided that where the Company is incorporated in a country outside His Majesty's dominions, the signature or seal of the person so certifying shall be authenticated by any of the British officials mentioned in Section 6 of the Commissioners of Oaths Act, 1889 (52 and 53 Vict., c. 10), or in any Act amending the same :

- (ii) where such translation is made in British India—
 - (a) by an Advocate, Attorney or Pleader entitled to appear before the High Court, or
 - (b) by an affidavit of some person having, in the opinion of the Registrar, competent knowledge of the language of the original and of English.

FORM XXXVII.**Notice of Address of the Registered or Principal Office of the Company****THE INDIAN COMPANIES ACT, 1913.**

(See Section 277.)

Filing fee Rs. 5.

Name of Company.....

Presented for filing by.....

Notice is hereby given, pursuant to Section 277 (1) (b) of the Indian Companies Act, 1913. by the.....
 (name of Company), incorporated in.....
 (country of origin), having a place of business in British India at.....
in the Province of.....
 that the situation of the registered or principal Office of the Company (in the country of origin) is :—

.....

Signature or signatures of any one or more of the persons authorised under
 Section 277 (1) (d) of the Indian Companies Act, 1913, or of some other
 person in British India duly authorised by the Company.

Dated theday of.....19... .

N.B — This notice must be filed within one month from the establishment of a place of business in the Province in British India.

FORM XXXVIII**Lists of Directors and Managers required by Section 277.****THE INDIAN COMPANIES ACT, 1913.**

(See Section 277.)

Filing fee Rs. 5.

Name of Company.....

Return pursuant to Section 277 (1) by—

The.....(name of Company) incorporated in.....
(country of origin) and which has a place of business in
 British India at.....of a list of its
 Directors and Managers.

Presented for filing by.....

List of Directors and Managers of the.....

Names of Directors and Managers.	Address of Directors and Managers.	Description or occupations of Directors and Managers.

Signature or signatures of any one or more
of the persons authorised under Section
277 (1) (d) of the Indian Companies in Act,
1913, or of some other person British
India duly authorised by the Company.

Date.

FORM XXXIX

Return of Persons authorised to accept service under Section 277.

THE INDIAN COMPANIES ACT, 1913.

(See Section 277.)

Filing fee Rs. 5.

Name of Company.....

Return pursuant to Section 277 (1) by —

The.....(name of Company) incorporated in
.....(country of origin) which has a place of business
in British India at.....of the names and
addresses of some one or more persons resident in British India authorised to accept
on behalf of the Company service of process and any notices required to be served
on the Company.

Presented for filing by.....

List of persons authorised to accept service on behalf of the Company.

Name of persons.	Residential Addresses.	Nationality.	Description or occupations.

Signature or signatures of any one or more
of the persons authorised under Section 277
(1) (d) of the Indian Companies Act, 1913,
or of some other person in British India
duly authorised by the Company.

Date.

FORM XL**Notice of Alteration in Charter, etc., under Section 277.****THE INDIAN COMPANIES ACT, 1913.****[See Section 277.]****Filing fee Rs. 5.**

Name of Company.....

Notice of alteration in the Charter, Statutes, Memorandum and Articles or other instrument constituting or defining the constitution of the Company.

Presented for filing by.....

Notice is hereby given, pursuant to Section 277 (1) of the Indian Companies Act, 1913, by the.....(name of Company) incorporated in.....(country of origin)..... and which has a place of business in British India at.....of alteration in the*.....constituting or defining the constitution of the Company.

Copy of alteration with copy of new deed, if one has been executed, and translation of alteration or any deed, if not in the English language, must accompany this notice and be shortly referred to here.

Signature or signatures of any one or more of the persons authorised under Section 277 (1) (d) of the Indian Companies Act, 1913, or of some other person in British India duly authorised by the Company.

Date.

NOTE.—This notice must be filed within one month after the date on which particulars of the alteration could, in due course of post and if despatched with due diligence, have been received in British India from the place where the Company is incorporated.

* Insert "Charter", "Statutes", "Memorandum", or "Articles" or other instrument as the case may be.

APPENDIX B

FORM XLI

**Notice of Alteration in the Address of the Registered or Principal Office
of the Company under Section 277.**

THE INDIAN COMPANIES ACT, 1913.

(See Section 277.)

Filing fee Rs. 5.

Name of Company.....

Presented for filing by.....

Notice is hereby given, pursuant to Section 277 (1) of the Indian Companies Act, 1913, by the.....(name of Company) incorporated in.....(country of origin) and which has a place of business in British India atof alteration in the address of the registered or principal office of the Company (in the country of origin).

Previous address.	Present address.	Date of change.

Signature or signatures of any one or more of the persons authorised under Section 277 (1)(d) of the Indian Companies Act, 1913, or of some other person in British India duly authorised by the Company.

Date.

NOTE.—This notice must be filed within one month after the date on which particulars of the alteration could, in due course of post and if despatched with due diligence, have been received in British India from the place where the Company is incorporated.

No. of Company

FORM XLII

Notice of Situation of the Principal Place of Business in British India or of any Change therein.

THE INDIAN COMPANIES ACT, 1913.

[See Section 277 (1) (e).]

Filing fee Rs. 5

To

THE REGISTRAR OF JOINT STOCK COMPANIES,

The..... Limited
incorporated in..... and
having places of business in the Provinces of.....
in British India, hereby give you notice, in accordance with Clause (e) of sub-section
(1) of Section 277 that the office situated at.....
in the Province of..... shall be
deemed to be the principal place of business of the Company in British India*
[instead of.....
(in the case of a change of address).]

Signature or signatures of any one or more
of the persons authorised under Section
277 (1) (d) of the Indian Companies Act;
1913, or of some other person in British
India duly authorised by the Company.

Dated this.....day of.....19.....

FORM XLIII

Notice of Alterations of Directors or Managers.

THE INDIAN COMPANIES ACT, 1913.

[See Section 277.]

Filing fee Rs. 5.

Notice of alteration in the list of Directors or Managers of the.....
.....(name of Company).

Presented for filing by.....

Notice is hereby given, pursuant to Section 277 (1) of the Indian Companies
Act, 1913, by the.....(name of Company)
incorporated in.....(country of origin) and which has a place of
business in British India at.....of alteration in the list of
Directors and Managers.

* Strike off the portion within the asterisks if not necessary.

Names of Directors and Managers.	Addresses of Directors and Managers.	Descriptions or occupations of Directors and Managers.	Remarks as to the alteration.

Signature or signatures of any one or more of the persons authorised under Section 277 (1) (d) of the Indian Companies Act, 1913, or of some other person in British India duly authorised by the Company

Date.

NOTE.—This notice must be filed within one month after the date on which particulars of the alteration could, in due course of post and if despatched with due diligence, have been received in British India from the place where the Company is incorporated.

FORM XLIV

Notice of Alteration in the Names or Addresses of Persons authorised to accept Process.

THE INDIAN COMPANIES ACT, 1913.

[See Section 277.]

Filing fee Rs. 5.

Name of Company.....

Notice of alteration in the names or addresses of the persons resident in British India authorised to accept on behalf of the Company service of process and any notices required to be served on the Company.

Presented for filing by.....

Notice is hereby given, pursuant to Section 277 (1) of the Indian Companies Act, 1913, by the..... (name of Company) incorporated in..... (country of origin) and which has place of business in British India at..... of alteration in the names or addresses of the persons resident in British India authorised to accept on behalf of the Company service of process and any notices required to be served on the Company.

Full names of Persons*	Residential Addresses.	Description or Occupation.	Alterations.	
			Date of alteration.	Particulars of alteration.

Signature or signatures of any one or more of the persons authorised under Section 277 (1) (d) of the Indian Companies Act, 1913, or of some other person in British India duly authorised by the Company.

Date.

NOTE, — This notice must be filed within one month after the date on which particulars of the alteration could, in due course of post, and if despatched with due diligence, have been received in British India from the place where the Company is incorporated.

FORM XLV

Statement of Affairs under Section 277

THE INDIAN COMPANIES ACT, 1913.

(See Section 277.)

Filing fee Rs. 5.

Name of Company.....

Statement in the form of a balance sheet by the.....
(name of Company)

Presented for filing by.....

Return pursuant to Section 277 (3) (ii) of the Indian Companies Act, 1913,
 by.....

The.....(name of Company) incorporated in.....
(country of origin) and which has a place of business
 in British India at.....of a statement, in the
 form of a balance sheet audited by the Company's Auditorst.....
 and made up to.....day of.....

+ A complete list must always be given.

* Insert names and addresses of Auditors.

Signature or signatures of any one or more
of the persons authorised under Section
277 (1) (d) of the Indian Companies Act,
1913, or of some other persons in British
India duly authorised by the Company.

Date

NOTE.—Section 277 (3) of the Indian Companies Act, 1913, is as follows :—

- " (3) Every Company to which this Section applies shall in every year file with the Registrar of the Province in which the Company has its principal place of business—
- (i) in a case whereby the law for the time being in force of the country in which the Company is incorporated such Company is required to file with the public authority an annual balance sheet—three copies of that balance sheet and if the balance sheet does not contain all the information provided for in the form marked H in the Third Schedule, such supplementary statements as shall furnish such information ; or
 - (ii) in a case where no such provision is made by the law, for the time being in force, of the country in which the Company is incorporated,—such a statement in the form of a balance sheet as such a Company would if it were a Company formed and registered under this Act, be required to file in accordance with the provisions of this Act :

The form of a balance sheet is prescribed in Section 132 which is as follows :—

- " (1) The balance sheet shall contain a summary of the property and assets and if the capital and liabilities of the Company giving such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets have been arrived at.
- (2) The balance sheet shall be in the form marked F in the Third Schedule or as near thereto as circumstances admit.

FORM XLVI

**Additional Declaration before commencing business in the case of a
Banking Company.**

THE INDIAN COMPANIES ACT, 1913.

(See Section 277I.)

Filing fee Rs. 3.

Name of Company.....

Declaration that the conditions of Section 277-I of the Act have been
complied with.

Presented for filing by.....

We*

being the Directors and* being the
 Manager of the
 do solemnly and sincerely declare (1) that shares have been allotted to an amount
 sufficient to yield a sum of at least fifty thousand rupees as working capital and that
 (2) a sum of Rupees has actually
 been received by way of paid-up capital.

(1)

(2)

(3)

(4)

(5)

Signature of all the Directors

Signature of Manager.

Dated this day of, 19.....

NOTES.—(1) This declaration should be verified by an affidavit signed by the Directors and the
 Managers of the Company in the form annexed.

(2) This form should be filed both by private and public Banking Companies.

ANNEXURE TO FORM XLVI

(To bear a non-judicial stamp of the value of Rs. 2.)

IN THE MATTER OF THE INDIAN COMPANIES ACT, 1913

AND

THE LTD.

Affidavit verifying declaration under Section 277-1.

We*

being the Directors, and*
 being the Manager of the above-named Company make oath (or solemnly affirm) and
 say as follows:—

That the declaration made by us under Section 277-1 of the Indian Com-
 panies Act, 1913, has been marked.....

That the particulars contained in the said declaration are true to the best of
 our knowledge and belief.

(1)

(2)

(3)

(4)

(5)

Signatures of all the Directors

Signature of Manager.

* Names and addresses should be given.

Sworn or solemnly affirmed at.....
 this.....day of..... 19.....
 before me.....
 Commissioner for Oaths

No. of Company.

FORM XLVII

Form of Monthly Statement of Banking Company.

THE INDIAN COMPANIES ACT, 1913.

(See Section 277-L.)

Filing fee Rs. 3.

Name of Company.....

Presented for filing by.....

Statement for the month of..... of the position
 of..... Ltd. as at the close of business on the following
 days of the Month.

(To be filed with the Registrar of Joint Stock Companies.....
 within the tenth day of the next month.)

	1st Friday *	2nd Friday *	3rd Friday *	4th Friday *	5th Friday *
I.—Demand Liabilities—					
II.—Time Liabilities—					
III.—Cash—†					
(a) Notes—					
(b) Rupees—					
(c) Subsidiary Coins—					

Signature.....

Designation.....

(Director, Managing Director, Manager or Managing Agent.)

Date.....

* Give dates (where Friday is a holiday under the Negotiable Instruments Act, the preceding working day).

† Cash must not include Balance at Bank or any item other than currency notes, Rupees and subsidiary coins.

